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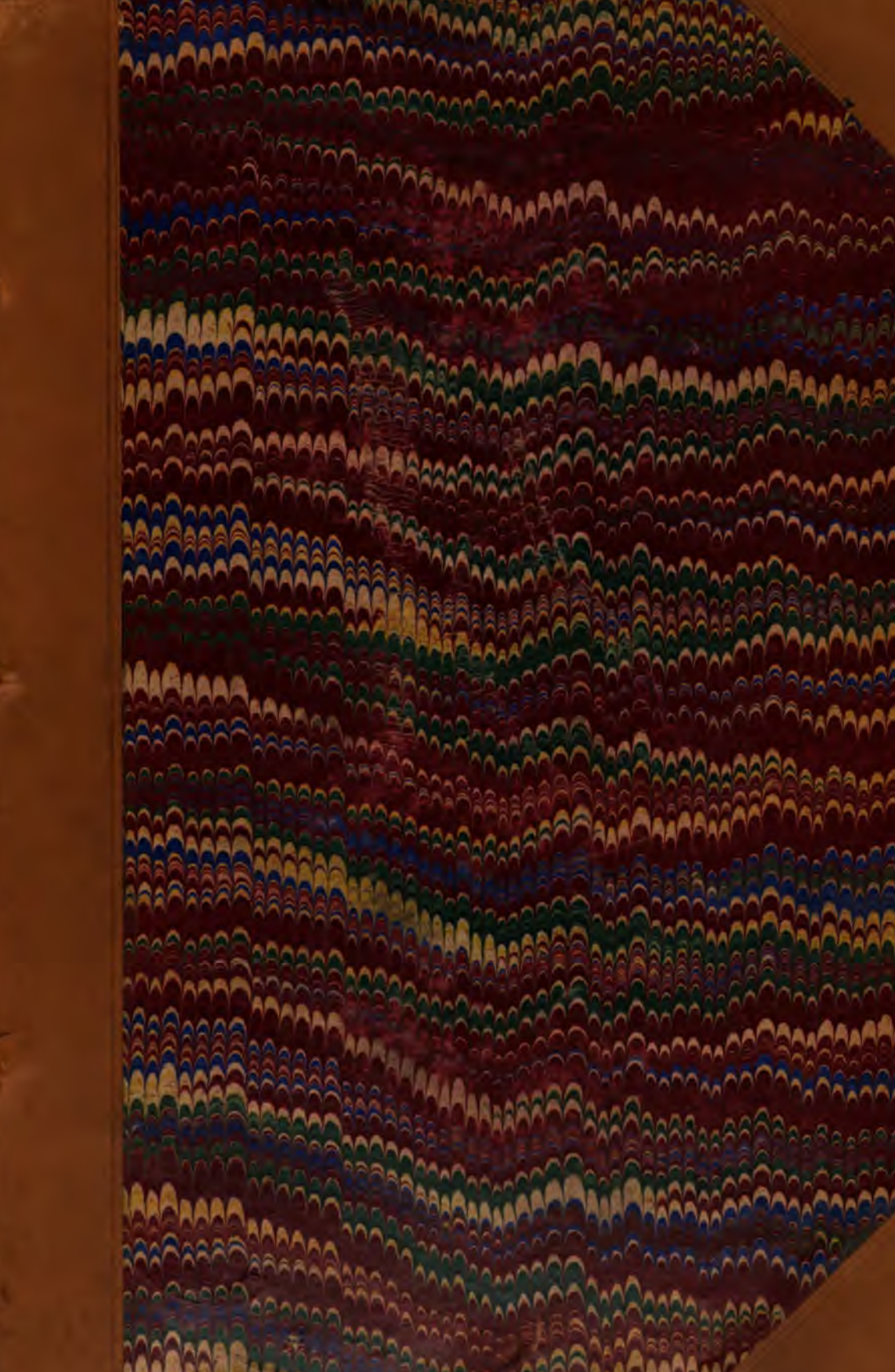

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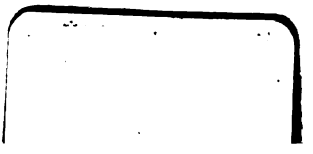

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THE

MONTREAL LAW REPORTS.

COURT OF QUEEN'S BENCH.

JAMES KIRBY, Editor.

CASES DETERMINED IN THE COURT OF QUEEN'S BENCH, MONTREAL,

1884—1885.

CONTRIBUTORS AND REPORTERS (*Reports distinguished by initials.*) { S. BETHUNE, Q.C. / JAMES KIRBY. / J. J. BEAUCHAMP. / E. LAFLEUR.

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JUDGES

OF

THE COURT OF QUEEN'S BENCH,

1885.

THE HON. SIR ANTOINE AIMÉ DORION, KT., *Chief Justice.*

"	SAMUEL CORNWALLIS MONK,	*Puisne Judges.*
"	THOMAS KENNEDY RAMSAY,	
"	ULRIC JOSEPH TESSIER,	
"	ALEXANDER CROSS,	
"	LOUIS FRANÇOIS GEORGES BABY,	

Attorney General:

THE HON. A. A. TAILLON, Q.C.

Solicitor General:

THE HON. E. J. FLYNN, Q.C.

Clerk of Appeals:

L. W. MARCHAND.

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DECIDED IN THE

COURT OF QUEEN'S BENCH

IN APPEAL,

MONTREAL.

February 21, 1884.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

McDONELL ET AL.,

(*Plaintiffs below*)

APPELLANTS;

AND

BUNTIN,

(*Defendant below*)

RESPONDENT.

Procedure—Judgment of distribution—Art. 761, *C. C. P.*

Held, that a party, whose claim against an immoveable seized and sold by the sheriff appears in the Registrar's certificate, but has not been collocated in the report of distribution, and who has failed either to contest the report of distribution or to appeal from the judgment homologating the same, or to present a *requête civile* or an opposition against such judgment, as required by art. 761 of the Code of C. P., cannot, by direct action, recover the amount of his said claim from the party collocated in such report to his prejudice.

This was an appeal from a judgment of the Superior Court at Montreal (RAINVILLE, J.), on the 16th February, 1883, maintaining the *défense en droit* filed by respondent

1884.
McDonell & Buntin.

to appellants' declaration and action, and dismissing their action with costs. (27 L. C. J. 73.)

The appellants' action was instituted on the 14th February, 1882, against respondent and one Joseph Dier, for the recovery from respondent of a sum of $330, with interest from the 1st November, 1879, alleged to be due to them by him in the proportion of $110 to each.

The declaration alleged that the appellants are the legal owners of a *bailleur de fonds* claim for $330 and interest as aforesaid, on certain real estate described in the declaration, which had been judicially sold, on the 22nd of December, 1880, by the Sheriff of Montreal, in the cause No. 2589, wherein one Thomas Dickson was plaintiff and said Joseph Dier was defendant.

That on the 7th February, 1881, a report of distribution of the net proceeds of the said sale was made and posted up by the Prothonotary of the said Superior Court; and by the eleventh and last item of said report the balance of the proceeds of said sale, after collocation of certain claimants, creditors and opposants, was awarded to said respondent as follows:—"11. To the opposant, Alexander Buntin, in part payment of his claim amounting to two thousand four hundred dollars, bearing interest at eight per cent., from the 18th November, 1877, founded upon an obligation and mortgage from Joseph Dier, in his favor, executed before Hunter, Notary, on the 18th May, 1869.... $2312.80
Costs of opposition to Messrs. Bethune & Bethune. 18.60

That the said collocation was contested and finally homologated on the 17th day of May, 1881, by judgment of the said Superior Court, and the said sums have been paid to the said respondent.

The declaration then alleged that, according to the Registrar's certificate, filed in the said cause, the appellants ought to have been collocated for said sum of $330 and interest preferentially to said respondent, and by the conclusions of the declaration the appellants prayed that the said respondent should be declared to have received the said sum of $330 and interest through error of law and

fact, and that he should be condemned to pay the same to the appellants.

The respondent filed a *défense au fond en droit* and a plea to the merits; but as the plea to the merits does not come up on the present appeal, it need not now be referred to.

The demurrer so filed by respondent was as follows:—

The said defendant, Alexander Buntin, for plea or *défense au fond en droit* to the declaration and action of the said plaintiffs, saith that the allegations of said declaration are insufficient in law to enable the said plaintiffs to have and maintain the conclusions of their said declaration for the following reasons:—

"Because, according to the allegations of said declaration the monies sought to be recovered by this action were awarded and adjudged to be paid to the said Alexander Buntin, under and by virtue of a judgment of this honorable Court duly and solemnly rendered, homologating the report of distribution in said declaration referred to, and the said judgment has never been vacated, revoked, reversed or otherwise annulled or set aside, either wholly or in part, and is still in full force, vigor and effect;

"Because, according to law, said judgment could not be reversed, either wholly or in part, except by judgment of the Court of Queen's Bench, on appeal to that Court, duly instituted;

"Because said judgment could not be otherwise vacated, revoked, annulled or set aside, either wholly or in part, except by means of a petition in revocation of such judgment, and then only on legal grounds, and that no legal grounds for so vacating, revoking, annulling or setting aside said judgment are assigned in said declaration;

"Because, even if said judgment were legally reversed or reformed or otherwise vacated, revoked, annulled or set aside, the said defendant, Alexander Buntin, could only be condemned to return to the Sheriff so much of said monies as the court might order him so to refund;

"Because the present action is not, or in the nature of, a petition in revocation of said judgment, nor are there

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any legal grounds of such revocation assigned or alleged in said declaration;

"Because the said defendant, Alexander Buntin, cannot, by reason of anything alleged in said declaration, be legally condemned to pay to the said plaintiffs the sums of money by them claimed in and by said declaration and action, or any part thereof;

"Because the conclusions of said declaration do not legally flow from nor are they legally justified by the allegations of said declaration."

The case having been heard on the issue raised by the demurrer, the demurrer was maintained and the appellants' action dismissed with costs.

The following was the judgment so rendered by the Superior Court:—

"La cour, après avoir entendu les demanderesses et le défendeur, Alexander Buntin, par leurs avocats sur la défense en droit, plaidée par le dit défendeur Buntin à l'action en cette cause; avoir examiné la procédure et délibéré;

"Attendu que les demanderesses allèguent qu'elles avaient une hypothèque sur une partie d'une propriété connue et désignée comme étant le No. 642 des plan et livre de renvoi officiels du quartier Saint-Antoine de la cité de Montréal, que le dit lot No. 642 était possédé par Joseph Dier qui l'avait acquis des auteurs des demanderesses en différents temps, et lequel lot comprenait des lopins de terre désignés comme lots Nos. 7, 8, 9 et 10, que le dit lot No. 642 aurait été vendu par le Shérif de ce district, et que sur le produit de la vente le défendeur Buntin aurait été colloqué par le rapport de distribution pour une somme de $2,312.80, et pour $18.60 frais d'opposition, la dite collocation étant basée sur une obligation consentie au dit Buntin par le dit Dier le 18 mai 1869, laquelle somme lui aurait été payée;

"Que les demanderesses auraient fait renouveler leur hypothèque sur le dit lot No. 642 suivant la loi, et que cependant elles n'auraient pas été colloquées.

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"Que par son obligation le dit Buntin n'avait hypothèque que sur le lot No. 10 et non sur les lots Nos. 7, 8 et 9, et que d'ailleurs il n'a jamais renouvelé son hypothèque, laquelle n'apparaissait pas au certificat du registrateur, et qu'il n'aurait pas dû être colloqué au préjudice des demanderesses dont l'hypothèque apparaissait au dit certificat; que la collocation du dit Buntin a été contestée et homologuée par jugement de la Cour Supérieure rendu le 17 de mai 1881;

"Attendu que les demanderesses concluent à ce que le dit lot No. 642 soit déclaré avoir été à l'époque de la dite vente par le shérif, hypothéqué en faveur des demanderesses au paiement d'une somme de $330 avec intérêt, comme balance du prix de vente; et à ce qu'il soit déclaré que le dit défendeur Buntin a été illégalement colloqué de tel montant, et à ce qu'il soit condamné à en rembourser les demanderesses;

"Attendu que le dit défendeur Buntin a plaidé par une défense en droit, alléguant que le jugement homologuant le dit rapport de distribution ne pouvait être attaqué et révoqué que par un jugement de la Cour d'Appel, ou par voie de requête civile pour les raisons donnant lieu à la requête civile, ce qui n'a pas été fait, que même dans le cas où le dit jugement serait révoqué, le défendeur Buntin ne pourrait être condamné qu'à remettre au Shérif tel montant que la cour jugerait à propos;

"Considérant qu'en vertu de l'article 761 du code de procédure civile, les dites demanderesses ne pouvaient se pourvoir contre le dit jugement que par opposition, dans les quinze jours, ou par appel, ou par requête civile; qu'elles n'ont pas produit telle opposition ou interjeté appel, et que leur présente demande n'allègue aucune des raisons donnant lieu à la requête civile;

"Considérant que la défense en droit du dit défendeur Buntin est bien fondée la maintient, et déboute les demanderesses de leur action quant au dit Buntin, avec dépens distraits à Messieurs Bethune & Bethune, avocats du défendeur, Buntin."

CROSS, J.:—

The appeal in this case is from a judgment sustaining

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a demurrer, and dismissing a suit brought by the appellants against the respondent.

The declaration complains that Buntin received under a judgment of distribution a sum of $330, which of right belonged to the appellants, under circumstances which may be briefly stated as follows:—

Joseph Dier was owner of a property in St-Antoine suburb, consisting of lot cadastral No. 642, which was again subdivided into a number of small lots.

One Joseph Dickson held a judgment against Dier, under which he brought the property to sale. The sheriff made a return of the proceeds accompanied by the registrar's certificate which the law required him to procure.

This certificate showed Buntin to be a hypothecary creditor on the property to a large amount.

It also showed that the *auteurs*, predecessors of the appellants, had a prior claim for their $330, as original vendors of two of the sub-division lots, a fact which was overlooked, Buntin having been collocated for the entire balance of proceeds, after the expenses and privileged claims, and the appellants omitted from the collocation, although their registration was duly made, showing their priority.

The judgment of distribution was homologated, and Buntin awarded the proceeds.

The appellants claimed from Buntin and Dier, the defendant, that $330 of money received by Buntin should be declared the property of the appellants, and Buntin be condemned to restore it to them, as having been received by him without cause and as money not due him, but due to the appellants.

This suit was met by a demurrer, based chiefly upon Art. 761 of the Code of Civil Procedure, which reads "that "any party aggrieved by a judgment of distribution may "seek redress by means of an appeal, or a petition in "revocation, if there are grounds for it, whether he has "appeared in the suit, or his claim being mentioned in "the certificate of hypothecs he has not appeared."

"Any creditor mentioned in the Registrar's certificate

" who has not appeared in the cause may, moreover, within " 15 days, seek redress by means of an opposition to the " judgment."

The demurrer takes the further ground generally that the appellant has no legal recourse against the respondent for the causes alleged.

It is contended that the appellants having failed either to appeal in time or seek recourse within 15 days by petition in revocation of judgment, are not limited or precluded by the provisions of this article from seeking recourse by an independent action; that it is a faculty given to the party injured which he may exercise or not, as he sees fit, but that he may nevertheless sue for what belongs to him; that the amount received by Buntin, and which ought to have been awarded to appellants, as their property, did not belong to Buntin, and ought to be restored to the appellants, the real owners.

It is not strictly true that the money belonged to the appellants; they were creditors, and pretended to have a preference over Buntin, but he also was a creditor, and the question of priority is one to be determined by the Court. The appellants should have attended to their interest in the distribution of the monies, and raised any question they had to raise before the monies were disposed of by the judgment of distribution. It is of importance that it should be so to avoid the great amount of litigation that would ensue if every person who found himself disappointed in the result of a distribution intended to be final, should be allowed to raise the question anew by an independent suit.

Before the law was enacted, which requires the Sheriff to procure and return with the proceeds of sale a Registrar's certificate, shewing the hypothecs on the property sold, every person who had a claim was obliged at the peril of losing his recourse, to bring forward and file his claim within a very limited delay, and watch the distribution of the monies to see that he had justice done him according to his rank. Now that the registrar's certificate is made a basis for collocating the rights of the parties, it

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does not follow that complete justice will necessarily be done a creditor or that he is guaranted against mistakes, without the exercise of any diligence on his part. It is only a further protection and security to him, but goes no further than the law itself warrants. Beyond this the law remains the same, favoring the diligent, and still requiring him to watch his interest against mistakes in the distribution of the monies. In this case the appellants have to suffer the consequences of their neglect, and the judgment must be confirmed. The award of the monies to Buntin must be considered a finality.

RAMSAY, J.:—

This case was argued principally as if the difficulty in appellant's way was that by the judgment there was *res judicata* against appellants, and our attention was specially directed to Art. 510 C. C. P. This is not, however, the real question. Persons called in by general advertisements are not parties in the sense of Art. 1241, C. C. In the language of the old writers they are more *quibus res judicata non noceat*. Appellant's real difficulty is that appellant's declaration does not bring the respondent within Art. 1047 C. C. There was no error either of fact or of law in paying respondent. He was paid under a collocation made according to law. The prothonotary is expressly enjoined by Art. 727 C. C. P. to make his report of distribution precisely as he made it; that is, "he must act according to the apparent rights of the parties." It was for the appellant to show within certain delays that these appearances were unreal. Not having done so, he loses his order of collocation, not on the principle of *res judicata*, but because he has neglected to protect his right. It seems perfectly clear that if respondent had received, to appellant's prejudice, money which was not due to him, the appellant might recover it. And so strong is this principle that our C. C. P. has an article (751) which provides a special procedure to allow this question of indebtedness to be raised in the suit, even after homologation of the report of distribution, and so long as the money is before the Court. This article shows, what is otherwise

clear, the judgment of distribution as far as regards order is final, and that it can only be set aside for the reason and in the manner in which other judgments can be set aside. Appellant's declaration contains no such reason, and therefore I think it was rightly set aside on demurrer.

Judgment of S. C. confirmed.

J. Calder, for appellants.

R. Laflamme, Q. C., counsel.

Bethune & Bethune, for respondents.

(S. B.)

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20 novembre 1882.

Coram MONK, RAMSAY, TESSIER, CROSS et BABY, JJ.

DAME MARIE CHARLOTTE MONDELET et al.,

(*Demandeurs en Cour Inférieure,*)

APPELANTS :

ET

PIERRE EMILE ROY,

(*Défendeur en Cour Inférieure,*)

INTIMÉ.

Servitude réelle—Banalité—Acte Seigneurial de 1854*—Preuve testimoniale.*

Par acte de partage passé en 1811 entre les propriétaires indivis d'une seigneurie, il fut stipulé que les co-partageants ne bâtiraient aucun moulin à farine ou à scie pour leur compte particulier sur leurs portions respectives, à une lieue à la ronde des moulins existant alors sur la dite seigneurie. Par acte de vente passé en 1850 un morceau de terre formant partie de la même seigneurie fut vendu par le représentant d'un des dits co-partageants, avec une stipulation portant que les acquéreurs et leurs représentants ne pourraient en aucun temps construire ou laisser construire sur le dit lot aucun moulin à farine ou à moudre le grain, que tel moulin fût mû par eau, vapeur, ou aucun autre pouvoir moteur.

Jugé: 1o. Que l'acte de 1811 a créé une servitude réciproque en faveur de chaque portion de la seigneurie divisée par le partage.

2o. Que si cette servitude était de sa nature une servitude seigneuriale, elle a été abolie par l'acte seigneurial de 1854, soit que l'on considère cette servitude comme un droit principal ou accessoire du privilége de banalité.

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3o. Que si la dite servitude n'était pas seigneuriale, elle a été constituée en faveur d'une seigneurie, et a disparu par la concession de l'immeuble en faveur duquel elle avait été créée.

4o. Que l'acte de vente de 1850 n'a pas créé une servitude réelle mais seulement une obligation personnelle, attendu qu'il n'indique aucun héritage dominant.

5o. Que l'existence d'un héritage dominant non constatée par l'acte ne peut pas être établie par la preuve testimoniale.

La présente action a été intentée par les appelants contre l'intimé comme propriétaire d'un immeuble, pour faire déclarer que cet immeuble est grevé d'une servitude réelle *non ædificandi*, et pour faire condamner l'intimé à démolir un moulin à farine par lui érigé sur ce terrain. L'action est basée sur les faits suivants :—

Par acte de partage du 23 septembre 1811, entre H. Marie Delorme et Pierre D. Debartzch, alors propriétaires indivis de la seigneurie de St. Hyacinthe, il fut stipulé que ce dernier aurait les trois-huitièmes de la seigneurie, et M. Delorme les cinq-huitièmes. Sur cette seigneurie se trouvaient des moulins à farine à St. Hyacinthe et à St. Pie, dont un, situé sur la rive sud de la rivière Yamaska, devait par le dit acte rester la propriété indivise des dits Delorme et Debartzch pour trois-huitièmes et cinq-huitièmes respectivement. Les partageants s'obligeaient mutuellement " de ne bâtir aucun moulin à farine ou à " scie pour leur compte particulier à une lieue à la ronde " des dits moulins à farine; mais au-delà d'une lieue de " distance, à compter des dits moulins à farine ci-dessus " mentionnés, chacune des dites parties pourra bâtir pour " son compte privé et particulier tel moulin à farine ou à " scie que bon lui semblera dans l'étendue de terrain à " chacune respectivement échue par ces présentes, sans " qu'aucune puisse prétendre droit de bâtir sur la partie " échue à l'autre aucun moulin à farine ou à scie."

Le 2 mai 1850, l'hon. L. T. Drummond et Dame J. E. Debartzch, son épouse, étant venus aux droits de M. Debartzch pour sa part de la dite seigneurie et pour les trois-huitièmes indivis du moulin de St. Pie susdit, vendirent à David Davidson et Robert Mackay, syndics à la faillite Savage, et à Joseph Savage lui-même, un morceau

de terre avec une tannerie et une scierie, voisins du moulin à farine et de la terre en question avec la stipulation suivante :—" It being, however, expressly agreed " that the said purchasers nor their assigns shall ever at " any time or on any pretence build or allow or suffer to " be built on the said lot of land, or on any part of the " Black or South branch of the Yamaska river, within the " limits of the seigniory of Saint Hyacinthe, any flour mill " or grist mill or any other mill where grain of any kind " shall be ground, whether the same be driven by water, " steam or any other motive power."

Le 6 mars 1854, M. et Mme. Drummond vendirent au juge Mondelet une partie de la seigneurie de St. Hyacinthe qui était comprise dans les trois-huitièmes échus en partage à M. Debartzch par l'acte du 23 septembre 1811. De cette vente est excepté "le pouvoir d'eau et terrain en " dépendant sur la branche sud de la dite rivière Yamaska, " vendu à un nommé Stimpson et qui est possédé par ce " dernier ou ses ayants droits en *franc aleu roturier* en vertu " d'actes entre lui et les vendeurs ; lequel terrain et pou- " voir d'eau est situé à environ trente ou quarante arpents " du village de St. Pie, et sera exploité par le dit Stimpson " ou ses ayants droits tel qu'il l'a été jusqu'à ce jour."

L'immeuble ainsi vendu à Stimpson paraît être le même que celui que M. et Mme. Drummond avaient précédemment vendu à Davidson et Mackay, et le défendeur paraît l'avoir acquis de l'hon. P. E. Roy, son père, qui en avait acquis une partie du shérif de St. Hyacinthe lors d'une vente judiciaire par lui faite sur un nommé Ornam Stimpson le 15 novembre 1867, et l'autre partie d'un nommé Théodore Stimpson, aussi adjudicataire lors de la même vente, par acte du 23 avril 1872.

Dans le courant de l'été et de l'automne de 1878 le défendeur a fait construire sur ce terrain un moulin à farine et a commencé à y moudre vers la fin de 1878 ou le commencement de 1879. A cette époque cinq des demandeurs étaient venus aux droits de M. le juge Mondelet pour les trois-huitièmes indivis, et les deux autres demandeurs (les Morin) étaient venus aux droits de H. Marie Delorme

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pour les cinq-huitièmes indivis, des terrains compris dans le partage de 1811.

Le 23 janvier 1879 les demandeurs ont protesté le défendeur et lui ont donné avis de démolir son moulin, et sur son refus de ce faire ont intenté cette action.

Le défendeur a opposé à cette action six exceptions péremptoires et une défense en fait, alléguant en substance, comme suit :—

Qu'il avait acquis le terrain en question de son père, comme susdit, et qu'aucune mention de charges ou servitudes n'avait été faite lors de la vente par le shérif à son père et au dit Théodore Stimpson.

Que les actes mentionnés dans la déclaration ne font aucunement voir que le terrain du défendeur est sujet à une servitude au profit des demandeurs.

Que les demandeurs ne peuvent se prévaloir utilement des stipulations contenues en l'acte du 23 septembre 1811 contre le défendeur qui n'y a pas été partie.

Que la prohibition de bâtir un moulin contenue dans l'acte du 2 mai n'a constitué aucune servitude sur le dit terrain en faveur d'un autre héritage ou de son propriétaire.

Que le défendeur, tant par lui que par ses auteurs, a eu depuis le 15 novembre 1867 la possession continue et non interrompue, paisible, publique et non équivoque et à titre de propriétaire, du terrain en question.

Qu'il a acquis ce terrain de bonne foi et par bons titres, publiquement et au vu et su des demandeurs, et sans protestations de leur part il a construit depuis juillet à décembre 1877, un canal et un moulin à farine à deux étages valant aux moins $6,000, et qui est en opération depuis le 1er novembre 1878.

Que les demandeurs n'ayant jamais fait connaître leurs prétentions au défendeur et ne l'ayant jamais mis en demeure de cesser ses travaux, ne peuvent maintenant demander la suppression d'ouvrages et de travaux qui ont tous été, avant protêt et mise en demeure, terminés et exécutés sur le terrain appartenant au défendeur.

Que le décret des terrains en question par le shérif le

15 novembre 1867 a eu l'effet de purger toutes les charges et servitudes non apparentes qui pouvaient exister sur iceux.

Que les demandeurs n'ont pas et n'ont jamais eu aucuns droits de servitudes ni autres sur les dits terrains, mais que, en supposant même qu'ils en eussent eus, ces droits auraient été entièrement purgés par le décrêt du 15 novembre 1867.

Qu'en outre, les demandeurs eussent-ils eu des droits de servitudes ou autres, ces droits seraient éteints et prescrits en vertu de la prescription de dix ans acquise en faveur du défendeur tiers-acquéreur de bonne foi.

Que dans le cas où les demandeurs auraient eu des droits, le statut provincial 19 et 20 Victoria, ch. 104, les auraient abolis et éteints, car ce statut autorise tout propriétaire à utiliser et exploiter tout cours d'eau qui borde, longe ou traverse sa propriété, et que le défendeur n'a rien fait de plus.

Que l'acte seigneurial de 1854 avait aboli et éteint tout privilége de banalité dans le genre de celui réclamé par les demandeurs; qu'une compensation raisonnable pour tous droits lucratifs possédés par les seigneurs leur avait été accordée, et qu'en conséquence tous tels droits avaient été abolis absolument; qu'un cadastre avait été préparé pour la seigneurie de St. Hyacinthe, et que tous les droits possédés par le seigneur à l'exception de la rente seigneuriale avaient été abolis, et que nommément les seigneurs de St. Hyacinthe avaient reçu une compensation pour tous tels droits qui virtuellement avaient été entièrement abolis.

Les réponses ne contiennent aucun fait nouveau.

Le 1er février 1881 la Cour Supérieure siégeant à St. Hyacinthe et présidée par l'honorable juge Sicotte, a rendu le jugement suivant:—

"La Cour, après avoir entendu les parties, examiné la procédure et la preuve:

"Considérant en fait que les demandeurs sont les héritiers et représentants de feu le juge Dominique Mondelet et de Marie Delorme, et que ces derniers étaient seigneurs et propriétaires des seigneuries désignées dans les écri-

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tures, ainsi que des droits seigneuriaux découlant de la tenure seigneuriale, et en possession à titre de seigneurs des moulins indiqués dans les écritures et dans les actes qui y sont relatés ;

"Considérant qu'il est constant que la seigneurie Debartzch a été acquise par M. le juge Mondelet avec et sous la condition que l'héritage alors possédé par le nommé Stimpson était excepté de la vente, et qu'il était tenu et possédé en *franc aleu roturier* ;

"Considérant qu'il est aussi constant que cet héritage est le même que celui vendu par le shérif en 1867 et maintenant possédé par le défendeur qui a fait en icelui le moulin dont la démolition est demandée ;

"Considérant que le fait dénoncé à l'acquéreur et à l'auteur des demandeurs, de la tenure en *franc aleu roturier* de l'héritage en question est exclusif de toute cession de droit de servitude quelconque par ces vendeurs contre cet héritage comme il constate sa libération de toute servitude de la nature de celle réclamée ;

"Considérant que les conventions faites par les auteurs des demandeurs, invoquées par ces derniers n'ont été faites que dans le but d'empêcher compétition entre les premiers quant à l'exploitation par eux de leur banalité, et que par la nature de ces stipulations, aucune servitude ne fut constituée, mais qu'il y eut simplement des conventions et des déclarations d'un caractère purement personnel et individuel ;

"Considérant que l'héritage du défendeur ne doit aucune servitude pour l'utilité d'un héritage appartenant aux demandeurs ;

"Considérant que le droit d'imposer des restrictions et des prohibitions générales, contre l'usage des eaux des rivières, dans les limites de leurs seigneuries, n'appartenait aux auteurs des demandeurs qu'en autant et parce qu'ils étaient seigneurs et propriétaires du droit de banalité, tel que réglé par la loi alors en force, concernant la tenure des terres dans les seigneuries ;

"Considérant que la tenure seigneuriale et tous les droits qui en découlent ont été abolis par l'acte seigneu-

rial de 1854 et que les auteurs des demandeurs ont réclamé et reçu l'indemnité accordée pour tous les droits qu'ils perdaient par l'abolition de la tenure seigneuriale, et nominativement pour la perte résultant de l'abolition du droit de banalité et des priviléges exclusifs quant à l'exploitation des eaux;

"Considérant que vu cette abolition et cette indemnité, les demandeurs comme héritiers et représentants des seigneurs en question sont sans droit pour réclamer la démolition du moulin à farine construit par le défendeur;

"Considérant que les demandeurs sont mal fondés dans leur demande et que le défendeur a justifié ses défenses, déboute l'action, avec dépens distraits aux avocats du défendeur."

Mercier, C.R., pour les appelants:—

1o. L'acte du 2 mai 1850 a créé sur l'immeuble du défendeur une servitude réelle appelée en droit "servitude *non ædificandi*."

L'article 499 de notre code civil définit la servitude:— "Une charge imposée sur un héritage pour l'utilité d'un autre héritage appartenant à un propriétaire différent," et l'article 548, § 2, dit que les "servitudes non apparentes" sont celles qui n'ont pas de signes extérieurs, comme, par exemple, "la prohibition de bâtir" sur un fonds.

La prohibition de bâtir un moulin à farine stipulée dans l'acte du 2 mai 1850 contient les caractères constitutifs d'une telle servitude.

Demolombe, Servitudes, No. 681.

Toullier, T. 3, p. 242, No. 382.

Daviel, Cours d'eau, T. 2, No. 607.

Cass, 7 fév. 1825 (D. 1825, 1, 84.)

Dorion & Rivet, 7 L. C. R., 257.

Minor & Gilmour, 9 L. C. R., 115.

Hamilton & Wall, 24 L. C. J., 49.

Il n'est pas nécessaire que l'acte constitutif de la servitude mentionne l'héritage dominant. Il suffit que l'existence de cet héritage soit certaine à l'époque du contrat et que la servitude stipulée sur l'héritage servant lui procure

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un avantage d'un caractère certain et permanent. Pardessus, Servitudes, T. 1, p. 32.

Il semble que ces autorités justifient les appelants à conclure que la prohibition contenue dans l'acte du 2 mai 1850 ne constitue pas seulement une *obligation personnelle* de la part de l'acquéreur de ne point bâtir, mais une véritable servitude réelle.

2o. Cette servitude n'a pas été purgée par le décret qui a été fait de l'immeuble en 1867.

S. R. B. C., ch. 36, s. 27.

C. P. C., art. 709.

Lefebvre & Gosselin, 9 L. C. J. 95.

3o. L'existence de cette servitude est indépendante du droit de banalité, et n'a pas été affectée par l'acte seigneurial de 1854. Cet acte, qui décréta la déchéance des droits seigneuriaux, n'a pas affecté les droits créés par des "conventions faites entre un vendeur et un acheteur quand même le premier aurait été seigneur" à l'époque de cette convention. S. R. B. C., ch. 41, pp. 406 et 407.

Décisions des Tribunaux, Quest. Seign., Vol. A., p. 305 *a*.

L'abolition consacrée par le statut est uniquement celle des droits féodaux attribués aux seigneuries "par les lois civiles de la France." Le législateur n'a pas voulu dépouiller les propriétaires de droits acquis en vertu de contrats librement consentis. Il ne devait ni ne pouvait le faire, comme le dit Chabot dans ses *Questions Transitoires*, (T. 3, p. 244.)

Lacoste, C.R., pour l'intimé:—

La stipulation de ne pas bâtir alléguée dans le partage du 23 septembre 1811 a été toute personnelle entre les parties à l'acte, et dans le but unique de protéger leur droit de banalité qui existait alors. Les parties ont pris la peine de spécifier qu'elles ne bâtiraient aucun moulin à farine ou à scie *pour leur compte particulier*, et n'ont jamais entendu créer par là une servitude sur tous les terrains entourant ces moulins.

L'article 499 du code dit: "La servitude réelle est une charge imposée sur un héritage en faveur d'un autre héri-

tage appartenant à un propriétaire différent." Dans le cas actuel aucune charge n'a été imposée sur un héritage quelconque pour l'utilité d'un autre héritage.

Même si une servitude réelle avait été créée par l'acte de 1811, elle serait éteinte depuis longtemps. Dans l'acte de vente du 6 novembre 1854 il est déclaré que le terrain possédé par Stimpson (qui est celui du défendeur) est tenu en *franc aleu roturier*, ce qui exclut toute cession de droit de servitude de la nature de celle qui est réclamée.

En outre, l'abolition de la tenure seigneuriale par l'acte de 1854, qui a aussi aboli tous les droits de banalité que possédaient les seigneurs avant ce temps, a mis fin à cette servitude si elle a jamais existé. Les seigneurs ont été duement indemnisés pour toutes les pertes causées par l'abolition de ces droits, et les demandeurs ou leurs auteurs ont reçu le montant de la compensation qui leur a été accordée pour la perte de ce droit de banalité.

L'acte du 2 mai 1850 n'a pas non plus créé une servitude. On ne peut pas trouver dans les termes de cette convention la constitution d'une servitude sur un héritage en faveur d'un autre héritage, et l'obligation a été toute personnelle.

Même en supposant que cet acte eût créé un servitude, elle serait éteinte comme celle de l'acte de 1811 aux termes de l'acte du 6 mars 1854 déjà cités.

Ces deux servitudes, si elles avaient jamais existé, seraient encore purgées par le décret du 15 novembre 1867 et par la possession par bons titres de l'intimé et de ses auteurs pendant au-delà de 10 ans.

Le statut 19 et 20 Victoria donne aux propriétaires riverains le droit de construire des moulins exactement comme a fait l'intimé.

Son Honneur M. le juge Ramsay a prononcé le jugement de la Cour d'Appel dans les termes suivants :—

RAMSAY, J. :—

The appellants, plaintiffs in the Court below, are : (1) Mme. Marie Charlotte Mondelet (Mme. Jules Lamothe) ; (2) Melle. Mondelet ; (3) Mr. Casimir Dessaulles, as tutor

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to his minor children by his late wife Mme. Emilie E. Mondelet; (4) Mr. and Mrs. Audy as joint tutors of the minor children of the late Jean Frédéric Gaudet and his late wife Mme. Marie Cécile Mondelet. These parties represent the late Mr. Justice Mondelet, also Olivier Morin the elder and Olivier Morin the younger, who hold under a deed from the late Mr. Justice Laframboise and his wife.

The action is brought to cause the defendant now respondent, to demolish a grist mill near the village of St. Pie.

The titles invoked by plaintiffs in support of their demand go back to 1811, when it appears that the *auteurs* of the first named plaintiffs and the *auteurs* of the Messrs. Morin were proprietors in possession *par indivis* of the whole seigniory of St. Hyacinthe. They were Mr. Marie Delorme and Mr. Pierre Dominique Debartzch.

On the 23rd September, 1811, these gentlemen made a *partage* of the greater portion of their seigniory, all in fact, but two pieces of land with grist mills erected upon them —one at St. Hyacinthe and the other at St. Pie. By this *partage* Mr. Delorme got five-eighths of the seigniory and Mr. Debartzch got the other three-eighths, and their shares in these mills and mill sites were to be in the same proportion.

By this division of the domain of the seigniory the right of *banalité*, including the right to prevent the construction of other competing mills, ceased to be a protection to the mills at St. Hyacinthe and St. Pie, in so far as concerned the action of the owners of the divided seigniory. Consequently Mr. Delorme and Mr. Debartzch stipulated "de ne bâtir aucun moulin à farine ou à scie pour leur compte particulier à une lieue à la ronde des dits moulins à farine, mais au-delà d'une lieue de distance, à compter des dits moulins à farine ci-dessus mentionnés, chacune des dites parties pourra bâtir pour son compte privé et particulier tel moulin à farine ou à scie que bon lui semblera dans l'étendue de terrain à chacune respectivement échue par ces présentes, sans qu'aucune puisse prétendre droit de bâtir sur la partie échue à l'autre aucun moulin à farine ou à scie."

In process of time the rights of Mr. Delorme devolved on Mme. Laframboise and her husband, and the rights of Mr. Debartzch on Mrs. Drummond and her husband.

Mr. and Mrs. Drummond then, on the 2nd May, 1850, sold to David Davidson and Robert Mackay, trustees of one Joseph Savage, certain real estate consisting of land and water power, and saw mill situated near the St. Pie mills, belonging to the heirs Delorme and Debartzch, as already mentioned, with the express stipulation that neither they nor their assigns should ever build "on any part of the Black or South branch of the Yamaska River within the limits of the seigniory of St. Hyacinthe, any flour mill, or grist mill, or any other mill where grain of any kind shall be ground, whether the same be driven by water, steam or any other motive power." The defendant holds under a title derived from Davidson and Mackay.

Afterwards, namely, on the 6th March, 1854, Mr. and Mrs. Drummond sold their seigniory to Judge Mondelet, *auteur* of the first five plaintiffs named, but there was no special transfer of any rights arising out of the deed to Davidson and Mackay, unless it can be drawn from the following clause:—"Est encore excepté de la présente vente, le pouvoir d'eau et terrain en dépendant sur la branche sud de la dite rivière Yamaska, vendu à un nommé Stimpson, qui est possédé par ce dernier ou ses ayants droit en *franc aleu roturier* en vertu d'actes entre lui et les vendeurs, lequel terrain et pouvoir d'eau est situé à environ trente ou quarante arpents du village de St. Pie, et sera exploité par le dit Stimpson ou ses ayants droit tel qu'il l'a été jusqu'à ce jour."

It appears that this is the same land sold to Davidson and Mackay and now held by Roy.

The deed of sale to Judge Mondelet further obliged him to suffer all servitudes that the seigniory was subject to; evidently a clause suggested by the obligations of the *partage* in favour of the Delorme share.

The 10th April, 1877, Mr. and Mrs. Laframboise sold to the Morins the five-eighths of the mills at St. Pie, formerly belonging to Mr. Delorme, "suivant le partage de 1811."

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From all these deeds plaintiffs contend that by the act of 1811 a conventional servitude was established in favour of the properties of the Delorme and Debartzch families; that these rights have all passed into the hands of the plaintiffs, and that they constitute a present prohibition to build a grist mill; that at any rate the heirs Debartzch, *auteurs* of the defendant, being obliged to suffer the servitudes of the seigniory sold to Judge Mondelet, *auteur* of some of plaintiffs, with an express warranty that the defendant's property should be used by him as it had always been, and that, moreover, the defendant's land is held liable to the servitude in express terms, or at all events by terms which imply the servitude.

The defendant meets the action by saying: that there never was a servitude even by the deed of 1811, that there is certainly no servitude by the deed of 1850, that if either or both of these deeds created a servitude it was one which was swept away by the abolition of the seigniorial tenure in the autumn of 1854, and the seigniors were indemnified for the loss; and lastly that an act also passed in 1854 gave the water power to the riparian proprietors.

The case looks very intricate at first sight, but I think it can be very easily decided by taking each deed separately and examining its effect.

It seems to me that the deed of 1811 created a *servitude réciproque* in favor of the domain of each share of the divided seigniory of St. Hyacinthe. That is, Mr. Delorme created in favour of the mill property at St. Pie a servitude on his share of the seigniory, and that Mr. Debartzch created a similar servitude on his share. If this servitude was seigniorial it was abolished by the Seigniorial Act of 1854, whether it be considered as a principal right or an accessory of the right of *banalité*, Qu. Seig. A. 85 *a*. If it be not seigniorial it was constituted in favour of a seigniory and it disappeared by the concession of the real estate in favour of which it was created. I think, therefore, that the stipulation in the act of 1811 has entirely disappeared, and consequently the rights claimed by the Morins disappear.

The representatives of Judge Mondelet have another title. They say the defendant has agreed by a special convention of his deed of purchase that he will not build a grist mill, and we are in the rights of his *auteur*.

The answer appears to me to be plain. It is either seigniorial or it is not. If it be seigniorial, it has disappeared as the stipulation in the deed of 1811. If it be conventional, which, I am disposed to think it is, what is the *héritage dominant*? There is none mentioned in the deed. It has been pretended that this might be supplied by parol. I don't think this proposition tenable. It would be to prove *outre le contenu des actes*. What the authors say is that it is not necessary for the constitution of a servitude that it should be created by using the special word, and that the constitution of a servitude may be gathered from the general terms of the deed. And so we held in the case of *Hamilton & Wall*.[1] But if such evidence were admissible, its effect would be to convert the deed, conventional and not seigniorial on its face, into a convention in support of a seigniorial right.

I think, therefore, that the deed created only a personal obligation in favour of Mr. and Mrs. Drummond. There then remains only the question whether they have transferred their rights to Mr. Justice Mondelet. As it has been said, the pretention that they have is solely based on the clause of the deed of 1854, above quoted. The terms of that clause are certainly embarrassing. The words of the first part of the sentence seem only to contemplate the excepting from the sale the piece of land now held by respondent, but at the end we have the odd assurance; "*et sera exploité par le dit Stimpson ou ses ayants droits tel qu'il l'a été jusqu'à ce jour.*" Even if these words apply to the *défense de bâtir* by the deed of 1850, which is not clear, we don't think they are *translatifs de propriété*, or that they are sufficient to create a warranty on the part of the vendors. It will be observed that the deed of 1854 is ostensibly the sale of a seigniory, and that all the words conveying title refer to the seigniory. It can hardly be presumed that a

[1] 24 L. C. J. 49.

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person of Mr. Justice Mondelet's great experience, especially as a real estate lawyer, would have been satisfied with such words as those used if he had intended to get a transfer of Mr. and Mrs. Drummond's rights under the act of 1850. We therefore think the judgment must be confirmed. I may add that we have not thought it necessary to enter upon the question as to the special Act as to the rights of riparian proprietors.

Jugement confirmé.

Mercier, Beausoleil & Martineau pour les appelants.
Lacoste, Globensky & Bisaillon pour l'intimé.
(E. L.)

Nov. 19, 1884.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

JOSEPH SIPLING

(*Plaintiff in Court below*),

APPELLANT;

AND

THE SPARHAM FIREPROOF ROOFING CO,

(*Defendant in Court below*),

RESPONDENT.

Qui tam action—27 *&* 28 *Vict., cap.* 43—*Affidavit.*

Held, that in the affidavit required by 27 & 28 Vict., cap. 43, the cause of action must be indicated sufficiently to identify the action sworn to with that actually prosecuted as specified in the declaration.

The judgment appealed from was rendered by the Superior Court, Montreal, RAINVILLE, J. The following were the reasons of judgment:—

"Considérant qu'aux termes du statut 27 & 28 Vict., chap. 43, aucune action *qui tam* ne peut être instituée à moins qu'il ne soit produit avec le fiat ou præcipe une

déposition assermentée du poursuivant déclarant, qu'en instituant cette poursuite, il n'agit pas collusoirement avec le défendeur dans le but d'empêcher toute autre personne d'instituer telle action, ou pour lui occasionner du délai, ou l'empêcher de réussir, ou pour sauver des frais au défendeur, mais qu'il intente son action de bonne foi dans le but de recouvrer telle amende avec toute célérité possible ;

"Considérant que la cause d'action doit apparaître par le dit affidavit et qu'avant de permettre l'émission d'un bref pour une telle action le prothonotaire doit connaître la cause d'icelle afin de permettre à la Cour d'identifier la cause d'action, qu'autrement il serait impossible de constater si le déposant a donné son affidavit pour l'objet pour laquelle l'action est prise, vu qu'un affidavit général et sans particulariser la cause d'action permettrait au demandeur de poursuivre pour n'importe quelle cause d'action ;

"Maintient la dite exception à la forme et renvoie l'action avec dépens distraits, etc."

CROSS, J. :—

The appeal in this case is from a judgment maintaining an exception *à la forme* to a *Qui tam* penal action.

The Statute of Quebec, 27 & 28 Vic., cap. 43, provided as follows:

"Whereas it has happened that persons who have "rendered themselves liable to prosecution in popular or "*Qui tam* actions for penalties have, in order to frustrate "or delay such actions, or to save themselves from the "payment of such penalties, or such part thereof as is by "law assigned to the prosecutors in such cases, caused "such actions to be instituted by friends of theirs, who "have been in collusion with them for that purpose, "therefore Her Majesty by and with the advice and consent, etc., enacts as follows:

"Henceforth no process of summons shall be issuable "or issued in any such action or prosecution unless there "be filed along with the præcipe or requisition for such "process an affidavit of such prosecutor declaring that in

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"so prosecuting he is not acting in collusion with the "defendant in such action, nor does he so prosecute for "the purpose of preventing such action or prosecution "being instituted by any other person, nor for the pur- "pose of delaying it or causing it to miscarry, nor for the "purpose of saving such defendant from the payment of "the whole or any part of such penalty, nor of procuring "to him any advantage, but that he institutes such pro- "secution or action in good faith, and for the purpose of "recovering, exacting and enforcing the payment of such "penalty with all practicable celerity."

The appellant produced an affidavit with his præcipe as initiatory proceedings, and as usual a declaration with the return of the writ, in which he set forth the cause of action.

The affidavit contained no reference to the præcipe nor the præcipe to the affidavit, and neither contained any special reference to the declaration, nor to the cause of action therein contained.

It is true that the affidavit contained these words, "in the present action," but this expression did not connect it with any particular action not described in the affidavit; moreover, at the time it was sworn to, and before being filed, no action could have yet existed to which it could have referred.

The præcipe asked for a writ in a *qui tam* action for $259,100 penalties. The declaration concluded for penalties amounting to $252,900.

The Superior Court quashed the prosecutor's proceedings, and dismissed his action on the ground that the cause of action should have been stated in the affidavit, so that the court could identify the action sworn to or indicated by the affidavit with the one actually prosecuted, as specified in the declaration.

It is obvious that the principle of this judgment is correct, at least, so far as identifying the action prosecuted with the one referred to in the affidavit, and the effective means of doing so is to state briefly it may be the cause of action in the affidavit, otherwise it would be impossi-

ble to say that the prosecutor had made affidavit to the precise action which he afterwards prosecuted, and such a general affidavit as he had made in this cause would allow him afterwards to prosecute for any cause of action. Although the provision of the statute concerning the matter is made in the public interest, it is clear that compliance therewith as regards the point now under consideration is made a condition precedent to the valid issue of a writ in such actions. In this case there is not only a failure to establish an identity between the action contemplated by the affidavit and the one prosecuted, but presuming that the præcipe required the writ for the former, there is proof that it is not the same as the one prosecuted, because the latter is an action for penalties to the amount of $252,900, and the præcipe asks for a writ in an action for $259,100.

It is not a sufficient argument for the prosecutor to say that the affidavit follows the language of the statute, and contains the exact words according to its requirements, unless these words are specifically applied to a particular action indicated by the affidavit. The affidavit is in general terms, and makes no special allusion to any particular action. It is therefore inapplicable and insufficient, and the judgment which held it so must be confirmed.

Judgment confirmed.

Archibald & McCormick for the Appellant.
Robertson, Ritchie & Fleet for the Respondent.
J. R. Gibb, counsel.
(J. K.)

Nov. 19, 1884.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

WALTER REED,

(*Plaintiff in the Court below*),

APPELLANT;

AND

THE SPARHAM FIRE-PROOF ROOFING CO.,

(*Defendant in the Court below*),

RESPONDENT.

Qui tam action—27 & 28 *Vict., cap.* 43—*Affidavit.*

Held, that a reference in the affidavit required by 27 & 28 Vict., cap. 43, to the action mentioned in the Præcipe "herewith filed," is not a sufficient identification of the action sworn to with that actually prosecuted as specified in the declaration.

CROSS, J.:—

This action was similar to that of *Sipling* v. *The Sparham Fire-Proof Roofing Co.* in being a *qui tam* action for a penalty. The affidavit was slightly different in that it referred to the action mentioned in the Præcipe herewith filed. This was an improper form of expression because when the affidavit was made neither it nor the præcipe could have been filed. It would have been in order to have declared in the præcipe that the affidavit was therewith filed. Nevertheless there was in the affidavit in this case a semblance at least of the identification with it of a penal action intended to be prosecuted. I would have been much disposed to hold the affidavit sufficient to answer the requirements of the Statute save that a stricter rule has already been laid down and a precedent established in a case decided by Mr. Justice Monk in 1867, *Gagnon* v. *St. Denis*, 12 L. C. J., p. 279, which the Court are disposed to follow. It is founded on English decisions in cases bearing a resemblance to the two now

in question, and adopts a rule advantageous to the defendant in that it gives him notice, on the responsibility of what the prosecutor is willing to swear to, of the nature of the charge brought against him. This Court has come to the conclusion to confirm the judgment in this case also, and that on the ground stated by the learned judge who rendered the judgment in the Court below.

RAMSAY, J.:—

These two cases must have the same fate. They stand on the same principle. They are both actions *qui tam*. The statute (27 & 28 Vict., c. 43) requires as a condition precedent to the issue of any such action that there shall be an affidavit of the prosecutor declaring that in thus prosecuting "he is not acting in collusion with the defen-"dant, nor does he so prosecute for the purpose of pre-"venting such action or prosecution being instituted by "any other person, nor for the purpose of delaying it, or "causing it to miscarry, nor for the purpose of saving such "defendant from the payment of the whole or any part "of such penalty, nor of procuring to him any advantage, "but that he institutes such prosecution or action in "good faith, and for the purpose of recovering, exacting "and enforcing the payment of such penalty with all "practicable celerity."

The affidavits filed in these cases refer to the actions as then existing when the affidavit was made and identify them in no other way. Now the test is, could you assign perjury on these affidavits? Evidently you would be stopped on the threshold by lack of identity, and therefore it is evident that there is no affidavit establishing anything at all with regard to either action. The appellant says that his affidavit is in the words of the Statute, and that he should not be obliged to say more than the Statute requires. This is self-evident; but although the affidavit pursues formally the words of the Statute it does not set forth all that the Statute requires, for it does not show its connection with "such action." The judge in the Court below did not say it was neces-

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sary to give a copy of the declaration, but that the affidavit should show the cause of action sufficiently to identify it.

Of course, it is easy to cry out against technicalities, but there are technicalities which are very important, and this is one. The defendant has a great interest in seeing that the suit he is defending is rightly brought because it is only an action brought with a proper affidavit that is a bar to another suit.

DORION, C. J.:—

There is no doubt that the judgment appealed from has pointed out the course which should be followed in every case of this nature, that is to say, the substance of the allegations should be contained in the affidavit itself. There must be a complete identification of the cause of action, so that a party may be prosecuted for swearing falsely.

Archibald & McCormick for the Appellant.

Robertson, Ritchie & Fleet, for the Respondent.

J. R. Gibb, counsel.

(J. K.)

January 25, 1884.

Coram DORION, C. J., MONK, RAMSAY, CROSS, and BABY, JJ.

TANSEY,

APPELLANT;

AND

BETHUNE ET AL.,

RESPONDENTS.

Costs—Privilege.

Held, that where a defendant, in an action of damages which has been dismissed with costs, causes an immoveable belonging to the plaintiff to be seized and sold by the sheriff, he is entitled to be collocated by privilege for such costs, on the proceeds of the sale.

This was an appeal from a judgment of the Superior Court here (JETTE, J.), rendered on the 6th October, 1882, maintaining the collocation in favor of respondents for the sum of $154.40 for costs in the report of collocation and distribution prepared by the Prothonotary, of the proceeds of the sale by the Sheriff of this district of the real property belonging to Bernard Emerson, in the writ of appeal in this cause mentioned, and dismissing the contestation of appellant.

By judgment of the Superior Court here, rendered on 29th November, 1881, an action of damages brought by said Bernard Emerson, against Adam Darling, Samuel Coulson and others, was dismissed with costs, *distraction* of which was thereby awarded to the respondents, the attorneys of record of said defendants, Adam Darling and Samuel Coulson, and which costs were subsequently taxed at the sum of $154.40.

Subsequently, respondents, as the plaintiffs *par distraction de frais*, issued execution against the goods and chattels, lands and tenements of said Bernard Emerson for the amount of their said costs, and caused the goods and chattels in his house to be seized; but the sale thereof was stopped by oppositions filed by his wife and her sister, claiming the ownership thereof.

Thereupon respondents caused a certain lot of land and premises belonging to said Bernard Emerson, No. 718 St. Lawrence Ward, of this city, to be seized under said writ, but the sale thereof was opposed by said Bernard Emerson, on the ground of alleged irregularities in the seizure. The opposition of Bernard Emerson was contested, and on the 19th April, 1882, was dismissed with costs, which were taxed at the sum of $35.25. A writ of *venditioni exponas* was thereupon issued, ordering the sheriff to proceed with the sale of said lot of land and premises, and on the 23rd May last (1882) the said lot of land and premises were sold to said appellant for the sum of $700 (the assessed value of the property being $2,000 as appears by the account filed by the city, paper 2 of the record).

On the 19th June, 1882, a report of collocation and dis-

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tribution of the proceeds of sale ($600.40, after deduction of the sheriff's fees and disbursements) was prepared by the Prothonotary and posted.

By this judgment respondents were collocated, 1st, for the sum of $10 for prosecuting to judgment said report; 2nd, for $6.80 costs of execution; 3rd, for $35.25 costs, taxed on judgment of 19th April, 1882, dismissing the opposition *afin d'annuler* of said B. Emerson; and 4th, for $154.40, amount of their costs taxed on judgment of 29th November, 1881, which dismissed the said action of said Bernard Emerson, with costs *distraits* to respondents, the attorneys of Adam Darling and Samuel Coulson, defendants in said suit.

After some further collocations, including one in favor of the City of Montreal for taxes, the appellant was collocated for the balance, in part payment of a sum of $1200, amount appearing to be due him by the Registrar's certificate under an obligation from Bernard Emerson to him, of 17th May, 1880, by which said lot of land was hypothecated.

On the 26th June, appellant contested the 5th item of said report, being the collocation in favor of respondents for $154.40 for their said costs of suit, but did not contest the other collocations in their favor.

The grounds of appellant's contestation were that by law, and specially by Article 606 of the Code of Civil Procedure, the costs of judgment in favor of a defendant and of a defendant's attorney have no privilege against, and do not rank before, a hypothecary claim existing against the immoveable sold, inasmuch as by said Article 606 only a plaintiff's costs of suit rank before such hypothecary claim.

That appellant was a creditor of said B. Emerson for $1,200 under a deed of obligation, executed on the 17th May, 1880, and duly registered on the 1st June, 1880, by which said lot of land was hypothecated in favor of appellant, and that under said report of distribution he has been only collocated for part of said sum.

That, moreover, the original suit in this cause was not

instituted until long after the registration of contestant's said hypothec.

That, furthermore, the privilege granted expressly by law to the plaintiff's costs of suit cannot be extended to the defendant's costs of judgment, in the absence of an express provision of law to that effect.

The contestant had a right to have the said fifth item struck out of the said report, and the said report reformed so that he might be himself collocated for the amount of said item.

The respondents thereupon inscribed said cause for hearing on said contestation, and on the 6th October last, the contestation was dismissed with costs, and the collocation in favor of respondents maintained.

The judgment was as follows:—

" La Cour après avoir entendu les parties, savoir, le contestant Tansey et messieurs Bethune & Bethune, créanciers par distraction colloqués pour leurs frais par le projet d'ordre de distribution préparé en cette cause, sur le mérite de la contestation par Tansey, de la dite collocation, pris connaissance des écritures des dites parties pour l'instruction de leur cause et des pièces au dossier et sur le tout délibéré ;

" Considérant que le contestant Tansey, créancier hypothécaire du demandeur, s'objecte à la collocation des dits maîtres Bethune & Bethune, disant, qu'ils n'ont droit à aucun privilége pour les frais par eux réclamés, attendu que ce ne sont que des frais de défense, et que l'article 606 du Code de Procédure Civile n'accorde tel privilége que pour les frais de poursuite du demandeur dans l'action ;

" Considérant que le privilége pour les frais de justice n'est pas établi par l'article du Code de Procédure Civile invoqué, mais bien par les 1,994 et 2,009 du Code Civil, qui ne comportent aucune restriction telle que celle alléguée par le contestant ;

" Considérant qu'en droit ce privilége s'étend à toutes les avances et dépenses faites par qui que ce soit, dans l'intérêt commun des créanciers, et à celles ayant pour résultat d'arriver à la réalisation du gage et à la distribu-

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tion du prix pour l'avantage de tous ;

" Considérant en outre que l'article 606 du code de procédure civile, surtout tel qu'amendé par le statut 33 Victoria, chapitre 17, article 2, n'a pour effet que de régler l'ordre de collocation des frais de justice entre eux, et ne saurait être interprété de manière à restreindre le privilége accordé pour les frais par les articles précités du code civil ;

" Considérant en conséquence que le défendeur qui, par ses procédures dans l'espèce, a procuré la réalisation du gage commun des créanciers du demandeur, ne saurait dans les circonstances être privé du privilége sus-mentionné ;

" Renvoie la contestation du dit Tansey et maintient la collocation au projet d'ordre de distribution en faveur des dits maîtres Bethune & Bethune pour leurs frais comme sus-dit ; et condamne le dit contestant Tansey aux frais de la dite contestation distraits aux maîtres Bethune & Bethune."

RAMSAY, J. (*dissentiens*) :—

This is an appeal from a judgment dismissing a contestation of the collocation of advocates for their costs as *distrayants* in a suit against the owner of property hypothecated in favor of appellant.

One Emerson was the owner of the property hypothecated. He brought an action against Darling and others ; defendants appeared separately and pleaded separately. The defendants were successful, and there was judgment dismissing the action with costs *distraits* to the respondents, the attorneys of two of the defendants. They took execution and seized the land hypothecated, and on the proceeds of the sale they were collocated for their costs in Emerson and Darling et al., as being part of the costs necessary to bring the real estate to sale. Appellant, the hypothecary creditor, contested this collocation on the ground that respondents had no privilege for their bill of costs in the suit of Emerson v. Darling et al. By the judgment of the Superior Court this contestation was rejected, and the hypothecary creditor appealed. It is not denied

that under the old law in France, there was no privilege for the costs of the action. There was only privilege for the *frais extraordinaires des criées* and in favor of the hypothecary creditor—the *frais ordinaires* were paid by the *adjudicataire*, 1 Pigeau, 810. But a specious argument has been put forward. It is said that this was because the hypothecary creditor could seize without an action, and therefore he gained nothing by the suit; that here it is different, that he gains by the suit all the expenses he would have to pay to get a judgment and sell. This might be a reason for altering the law; and in certain circumstances, and with some limitations, perhaps the old law might be changed with advantage, but I don't think that in a matter of this kind it is competent for the Court to create a privilege of this sort or to extend any that may exist beyond the precise words of the law. It is, however, contended that, independently of all legislation, there should be a privilege here for the costs of the seizing creditor, whoever he may be, because there is no *titre paré* in this country, and that the equitable reason is so strong that it justifies the courts in creating a privilege.

In the case of *The Eastern Township Bank & Pacaud* this doctrine was maintained before the Code, 1 L. C. R. p. 126. It is, however, to be observed that this judgment is not of the highest authority. The judgment in appeal reversed the judgment of the Court of Review—it was not unanimous, and the majority was completed by the opinion of a judge *ad hoc*. But what is still more important is that the reasons given in support of the judgment appear to me to be either erroneous, or to lead to a conclusion directly the reverse of that arrived at.

In the first place, all hypothecary creditors had not a *titre paré* and all *titres parés* did not give a right to execute *de plano*. This is apparent by the very quotations from Pigeau relied upon in the case referred to (1 Pigeau, 43 and 45). In the second place the judgment is supported on a text of the Digest, 2, 3. Tit. 5 L. 6, § 3. Now this Title is *de negotiis gestis*; and a moment's examination shows how utterly the Roman Law is incompatible with the

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reasoning of the learned judge. The rule is this: if you act for yourself and not for me you have *not* the action *negotiorum gestor* against me; but if you mix yourself up in my affairs for your own benefit I have that action against you. But still, if you have done something about my affairs, you shall not have an action for what it cost you, but for what I gained. Judge Polette and the majority of the Court of Appeals said, if they really relied on the text of law they quoted, that the party has an action for what it cost him to interfere, not what it benefits the hypothecary creditor. They have made no semblance of proof that the appellant has grown richer at their cost. I think this establishes that under the old law there was no privilege for the costs of action to the hypothecary creditor, and none certainly to the chirographary creditor, but only to the former for the costs of execution.

To what extent is this altered by the Code of C. P.? Art. 606, § 7. "The plaintiff is next paid his costs of suit, taxed as in an uncontested case not inscribed for proof."

The "plaintiff," according to its ordinary signification, does not include those in the position of the respondents. But, it is said, they are plaintiffs on their *distraction*. I cannot think that is a fair interpretation. Nor do I think the respondents' pretensions are supported by articles 1994–5 and 2009, § 5, C. C. Still less can I find any argument in support of their pretensions in the 33 Vic. c. 17, sect. 7, Q.

BABY, J.:—

This is an appeal from a judgment of the Superior Court maintaining the collocation in favor of respondents for the sum of $154.40. The case involves a question of considerable interest to the members of the bar.

It appears that one Bernard Emerson brought an action of damages against Adam Darling and others, which was dismissed with costs, *distraction* of which was granted to respondents, the defendant's attorneys.

These costs were taxed at the sum of $154.40, and Emerson having failed to pay them, the respondents took out an execution, and caused to be seized a certain lot of land

belonging to the said Emerson, who, by opposition to the sale on pretence of certain irregularities in the seizure, caused a further sum of $35.25 for costs to accrue.

This opposition being dismissed with costs, on writ of *Venditioni Exponas*, the lot of land in question was sold and adjudged to appellant for the sum of $700.

This sum of money having been brought into Court in the ordinary course, a report of collocation and distribution of the proceeds of said sale was prepared by the prothonotary and posted in the ordinary way.

By this report, the respondents were collocated for the two above-mentioned sums.

The appellant, who was an hypothecary creditor of Emerson to the amount of $1200, not getting the whole of his claim, as appeared by the Registrar's certificate, but only a small part thereof, contested the 5th item of the report: the collocation in favor of respondents for the $154.40, being their costs of suit. In his contestation, Tansey says that respondents were wrongfully and illegally collocated in preference to himself and to his prejudice, inasmuch as, by law, and specially by Art. 606 of the Code of Civil Procedure, the costs of judgment in favor of a defendant and of a defendant's attorney have no privilege against and do not rank before a hypothecary claim existing against the immoveable sold, the only costs ranking before a hypothecary creditor being those of the plaintiff.

This pretension of appellant was set aside by the judgment below.

It was held by the learned judge that the privileges for costs, *frais de justice*, were not fixed by the Code of Civil Procedure but by articles 1994 and 2009 of the Civil Code, in which were to be found none of the restrictions alleged by the contesting party, and that, in law, all the law costs and all expenses incurred in the interest of the mass of the creditors were privileged; also that Art. 606 of the Code of Civil Procedure, as amended, applied only to the order in which such law costs should come in, and was not to be taken as a restriction of the privilege granted for costs

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by the above-cited articles of the Civil Code: That the costs incurred and claimed by respondents had been made "*afin de procurer la réalisation du gage commun des créanciers*," and therefore Messrs. Bethune could not be deprived of the privilege given to them by law. I may say, at once, that the majority of this Court takes the same view of the case. The costs claimed by respondents, as privileged, have been incurred, undoubtedly, in the interest of the mass of the creditors, as the claim thereof on the plaintiff had the effect of bringing the property to a sale. But, says appellant, the privilege for costs is granted to plaintiff's attorney and not to the defendant's. This is playing upon words; all that is required by law for the costs to be privileged is that they should be incurred in the interest of the mass of the creditors, and by the word *interest* is meant the bringing to sale of the *gage commun* of the creditors. Who here caused the lot of land in question to be brought to sheriff's sale and the proceeds thereof divided among the hypothecary creditors? Respondents, nobody else, as already remarked. The creditors benefited thereby, and the position of the respondents cannot be assimilated to anything but that of plaintiffs on the seizure, which they are in fact. This is the only interpretation that can be given to the articles hereinabove mentioned, notwithstanding what may be laid down to the contrary in the Roman Law or the principles which may have governed the matter in times past.

The decision is altogether in accordance with the universal practice and jurisprudence followed in the Province of Quebec since the Civil Code has become law. Previously, there was a difference between the practice followed in the District of Montreal and the one held in that of Quebec. In the latter, a certain amount of costs was considered privileged whilst in the former, the costs of the execution and seizure alone were reputed so. But under the new law, all differences have disappeared, the practice has become uniform, and all costs incurred to bring the property to a sale have been considered to be privileged, and ranked, accordingly, on the collocation

sheet. I am free to admit that, as the law stands now, an hypothecary creditor may sometimes suffer somewhat from the large amount of costs incurred by the prolonged litigation of the parties, but this is matter for the consideration of the legislator who may restrict this privilege hereafter, and not for the tribunals of justice. This Court must deal with the question according to the law as it now stands, and not on what it should be.

The judgment is, therefore, confirmed with costs.

Judgment of S. C. confirmed.

J. Calder, for appellant.

Bethune & Bethune, for respondents.

(S. B.)

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19 novembre 1884.

Coram DORION, J. C., MONK, TESSIER, CROSS & BABY, JJ.

LE REV. J. C. G. GAUDIN,

(*Demandeur en Cour Inférieure*)

APPELANT;

ET

JOHN ETHIER,

(*Défendeur en Cour Inférieure*)

INTIMÉ.

Dîme—Action du curé contre acheteur après la récolte—Privilége.

JUGÉ: Que la dîme est due par celui qui a récolté le grain, et non pas par celui qui l'a simplement fait battre et vanner.

2. Que le privilége du curé pour la dîme existe sur les récoltes qui y sont sujettes tant que le grain reste en la possession de celui qui l'a récolté, mais se perd dès que ce grain passe sans fraude entre les mains d'un acquéreur de bonne foi pour valable considération.

DORION, C.J.:—

Le demandeur appelant, curé de la paroisse de St-Valentin, a poursuivi le défendeur, cultivateur et commerçant de grains, de la paroisse de St-Cyprien, pour la somme de

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$10.52 qu'il prétend lui être due comme représentant la dîme sur une certaine quantité de grains que le défendeur a acheté d'un nommé Edouard Chouinard, cultivateur de la paroisse de St-Valentin, qui avait lui-même cultivé, récolté et engrangé ce grain. Le défendeur après avoir acheté ce grain l'a fait battre et vanner, et la prétention de l'appelant est que le défendeur doit la dîme sur ce grain.

La Cour Inférieure a renvoyé cette action (1), et nous sommes tous d'opinion de confirmer ce jugement. L'appelant avait en effet un privilége pour sa dîme sur le grain en question, mais seulement en autant qu'il restait en la possession de celui qui l'avait récolté, et qui devait la dîme. Du moment que le grain a changé de mains par la vente ou autre transmission de propriété, ce privilége du curé est détruit, comme tout autre privilége de cette nature.

L'appelant a cité un arrêt de la Cour du Banc du Roi rendu le 16 septembre 1808, à Montréal, dans une cause entre Messire Pierre Robitaille, demandeur, et Ignace Lamarre, défendeur, qui a maintenu l'action du curé pour la dîme contre le défendeur qui avait acheté une récolte en partie sur pied et en partie en grange. Quant à la portion achetée sur pied il n'y a pas de difficulté ; le défendeur ayant récolté ce grain devait en payer la dîme ; mais il est difficile de comprendre le jugement à l'égard du grain acheté par le défendeur après qu'il avait été mis en grange. Les faits de cette cause ne sont pas exposés d'une manière tout à fait satisfaisante, mais nous sommes portés à croire qu'il y avait une question de fraude, qui a déterminé cette partie du jugement.

Dans l'espèce actuelle, qui ne présente aucune fraude, nous ne sommes pas disposés à étendre le privilége du curé sur le grain qui a passé entre les mains d'un tiers-acquéreur de bonne foi pour valable considération. La dîme existe sur le grain seulement et non pas sur la paille.

(1) Voir l'opinion de Son Honneur M. le juge Chagnon rapportée au 6e vol. du Legal News, p. 165.

et le curé n'a aucun droit de suite ou de revendication qui lui permette de saisir les gerbes entre les mains d'un tiers-acquéreur.

Jugement confirmé.

Pagnuelo, Taillon & Lanctot, pour l'appelant.

Paradis & Chassé, pour l'intimé.

(E. L.)

March 27, 1884.

Coram DORION, C.J., MONK, RAMSAY, CROSS, & BABY, JJ.

THE EXCHANGE BANK OF CANADA, v. CRAIG ET UX., and POTTER *mis en cause.*

Procedure—Inscription for enquête.

Held, that is not competent to any party in a cause to inscribe for the adduction of evidence at length, without the consent of all the parties.

Semble, that any party may insist upon proceeding at *enquête* and merits at the same time.

DORION, C.J.:—

An application was made in this case for leave to appeal from an interlocutory judgment of the Superior Court, granting the plaintiff's motion to reject the defendant's inscription for the adduction of evidence at length. The real question in the case is whether a party can be forced to go to *enquête* at length. Article 243 of the Code of Procedure says: "Any party may, either in his declaration or in any other pleading, or by a notice served upon the opposite party, declare his option that the case shall be inscribed at the same time for proof and for final hearing immediately after proof." This was not done here. Article 234 says: "When the case is not to be tried by a jury either of the parties may inscribe it upon the roll for the adduction of evidence." The defendant contends that under this article he had the right to inscribe for *enquête* generally; that is, if the other party did not make the option under article 243, the defendant had the right to inscribe under article 234. Article 236, which has

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some bearing upon the case, is in these words: "The evidence is taken down in writing, either at length or in notes, according to the provisions contained in this section." Then article 284, upon which the plaintiff relies to reject the inscription, is in these terms: "Upon the consent in writing of all the parties to a case, the proof may be taken down in writing in the manner hereinafter provided, either before a judge or before the prothonotary," etc.

From this the plaintiff argues that you cannot in any case take the *enquête* in the ordinary form unless you have got the consent of both parties. There is no doubt a contradiction to some extent between articles 234 and 284; but, taking all these articles together, the court has to give an interpretation to them, and the interpretation which it puts upon them is this—that no *enquête* shall be proceeded with in the old manner without the consent of both parties. In the case of the *Queen* v. *Martin*, an *enquête* was proceeded with in the old manner, and it was held by Mr. Justice Ramsay that the witness could not be prosecuted for perjury upon the deposition because there was not a consent in writing. The effect of the present judgment is to hold that one party can always insist upon proceeding at *enquête* and merits. The motion for leave to appeal is, therefore, rejected.

MONK, J., (*dissentiens*):—

I think this appeal should be allowed. The defendant inscribed for *enquête* alone. It is true that he put "for the adduction of evidence at length" in his inscription. The inscription was objected to on the ground that the defendant had no right to inscribe for *enquête* at length without the consent of the opposite party. I cannot understand how it is practicable to carry on an *enquête* for the adduction of evidence in that way, if before inscribing you must have the consent of the other party. I am of opinion that under article 234 the defendant's inscription should be maintained.

RAMSAY, J.:—

There is always difficulty in deciding as to matters of

procedure on the articles of the code, and our procedure will probably continue to create unnecessary embarrassment as long as it is subjected, without control, to fitful experiments. But in this case the history of the legislation before us is recent and well-known. The old *enquête* system which was a subject of diversion to travellers who visited the court house, was to be remodelled and the scheme adopted was to take the evidence and hear the case at once before a judge, as if it were being tried before a judge and jury. The inscription for merits and hearing then became the ordinary proceeding, and an *enquête* at length under the old system was a matter of consent. (Art. 284, C. C. P.) But it has been urged by the party moving for leave to appeal that under Article 234 he had a right to inscribe, and that it then perhaps became a matter of consent whether it should be proceeded with at length. There are two answers to this. In the first place article 234 belongs to section 1, which enters into no special details as to the mode of proof, but is general. In the second place the inscription was for the adduction of evidence at length, which could not be carried out without consent. This inscription had, therefore, to be dealt with to clear the record of a useless procedure, and the court below properly dismissed it on motion. As to the case of the *Queen* v. *Martin*,[1] to which reference has been made, I do not consider that it has any special bearing on this case. The question was whether perjury could be assigned upon a deposition where the consent in writing was not produced, and upon the authority of an English case the court held that it could not. It was a question under the criminal law.

Motion for leave to appeal rejected, Monk, J., dissenting.

Macmaster, Hutchinson & Weir, for plaintiff.

L. H. Davidson, for defendants.

(J. K.)

[1] 21 L. C. Jurist, p. 156.

November 24, 1884.

Coram DORION, C.J., MONK, RAMSAY, TESSIER and BABY, JJ.

LA CORPORATION DU VILLAGE DU BASSIN DE CHAMBLY,

(*Defendant below*),

APPELLANT,

AND

SCHEFFER,

(*Plaintiff below*),

RESPONDENT.

Municipal law—Collection Roll—M. C. 955.

Held, that the formalities prescribed by the Municipal Code with reference to a collection roll must be strictly followed, as in the case of an *acte de répartition* annexed to a *procès verbal*, and where such formalities have not been observed the taxes thereby imposed are not exigible, and a sale of land for arrears of such pretended taxes will be annulled.

2. Where the taxes are illegal in consequence of there being no valid collection roll in existence, acquiescence will not give validity to such assessment.

BABY, J. (delivering the judgment of the Court):—

Le jugement dont on se plaint ici a été rendu par la Cour Supérieure siégeant à Montréal, dans une action demandant la résiliation d'une vente opérée par la corporation du comté de Chambly, à la requisition de l'appelante, d'un huitième de l'immeuble de l'intimé, pour non paiement de prétendues taxes imposées dans la municipalité.

L'intimé allègue par sa déclaration que les formalités voulues par la loi pour arriver à faire vendre un immeuble pour taxes municipales n'ont pas été suivies, entr'autres qu'il n'existe aucun rôle de perception dans la municipalité pour les années 1878, 1879, 1880, et que ces taxes sont nulles et non exigibles en loi.

L'appelant a rencontré cette action, 1o. par une défense en droit dans laquelle il dit d'abord, vous n'alléguez pas dol ou artifice de la part de l'adjudicataire, et ensuite vous ne faites pas voir que les conditions et formalités essentielles prescrites pour la vente n'aient pas été observées. 2o. par une exception dans laquelle il affirme que la vente en question a été faite avec toutes les formalités requises en loi; que l'adjudicataire est devenu propriétaire du terrain en question; que lors même que toutes les formalités exigées par la loi pour le prélèvement des taxes municipales n'auraient pas été remplies le demandeur était mal fondé à venir se plaindre par son action; que les règlements mentionnés par Scheffer n'avaient jamais été attaqués ou cassés; et qu'enfin le demandeur avait reconnu ces taxes et promis les payer. Et puis venait une réponse générale.

Une réplique spéciale fut produite de la part de l'intimé repétant les allégations de sa déclaration à peu près.

Voilà en quelques mots les prétentions respectives des parties.

Par son jugement, l'Hon. Juge Taschereau, rejetant la défense en droit comme mal fondée, a maintenu l'action de Scheffer et a mis à néant la vente en question, s'appuyant surtout sur l'absence des rôles de perception pour les années 1878 et 1879 et le fait que le secrétaire-trésorier du temps avait illégalement transmis le nom de Scheffer au conseil de comté comme arréragiste pour l'année 1880, contrairement aux dispositions de l'art. 373 du code municipal, ce secrétaire-trésorier, bien loin de recevoir l'ordre du conseil local de faire telle transmission, ayant reçu au contraire instruction formelle de ne le point faire.

Cette cour partage cette manière de voir.

Les taxes pour être exigibles doivent être imposées avec toutes les formalités exigées par la loi. Ces formalités sont la sauvegarde des contribuables. S'il n'y a pas de taxes légalement dues et exigibles comment pourrait-on procéder à la saisie et vente de la propriété de l'intimé? Ici, il y a absence de rôles de perception. C'est en vain que l'appelant s'évertue de démontrer que le livre ou

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cahier qu'il produit faute de rôle comporte tout ce que la loi exige qu'un rôle de perception contienne. C'est un livre de compte pure et simple. Le rôle de perception est un document authentique complet en soi, préparé chaque année ou en tout autre temps fixé par le conseil et qui contient, au désir de la loi (C. M. 955) :—

1. Les noms et état de chaque propriétaire contribuable inscrit au rôle d'évaluation, ou le mot " inconnu " si le propriétaire est inconnu ;
2. Les noms et état de toute personne qui occupe un terrain imposable, sans en être propriétaire, si elle est connue, qu'elle soit inscrite ou non sur le rôle d'évaluation ;
3. La valeur réelle des bien-fonds imposables de chaque contribuable ;
4. La valeur des biens déclarés imposables en vertu de l'article 710 de chaque contribuable ;
5. Le total des valeurs imposables de tout contribuable ;
6. Le montant des taxes payables par chaque contribuable.

Il doit être déposé par le secrétaire-trésorier dans son bureau, après avoir été complété, duquel dépôt il donne avis public et requiert toutes les personnes sujettes au paiement de taxes d'en payer le montant, à son bureau, dans les 20 jours qui suivent la publication de cet avis, et ce n'est qu'à l'expiration du délai de 20 jours que le secrétaire-trésorier doit faire la demande du paiement de ces taxes (Art. 961.)

Les dispositions du Code Municipal doivent être interprétées dans un sens large, je l'admets, mais il y a de ces formalités qui constituent la chose elle-même en quelque sorte, et on ne saurait les écarter sans commettre une grave injustice ou sanctionner un ordre de choses que le législateur n'a pas voulu admettre.

Voyez comme la loi entoure de précautions et de formalités rigoureuses l'acte de répartition attaché à un procès-verbal ou à un règlement. Or, qu'est-ce qu'un rôle de perception si ce n'est une répartition sur tous les municipes, à raison de leur intérêt foncier dans la chose municipale, des taxes que la municipalité impose ? Le premier est restreint dans ses effets et l'autre est général, voilà tout. Pourquoi alors ne point donner autant d'authenticité à l'un qu'à l'autre ? Faire autrement ce serait aller contre l'ésprit aussi bien que la lettre de la loi, nul doute.

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Mais il y a acquiescement, ajoute l'appelante, et cela couvre toutes les formalités. Soit pour certaines informalités mais non pas celles de la nature de celles-ci. L'intimé n'a pu se soumettre au paiement d'une taxe qui n'avait pas d'existence légale; il a audité les comptes du secrétaire-trésorier qui ont été trouvés correctes, dit-on. Oui, mais cela n'a pas donné droit à la corporation de réclamer de lui une taxe qui n'existait pas. Elle n'était due par lui et exigible par la corporation qu'en autant que cette dernière avait, par ses officiers, fait ce qui était essentielle pour donner à cette taxe une existence légale, à défaut de quoi Scheffer ne devait rien. Assurément, ce prétendu acquiescement n'est donc d'aucun effet.

Maintenant, quant à la taxe de 1880, le prélèvement par voie de saisie et vente de l'immeuble en question pour non paiement n'était nullement autorisé par le conseil, tel que le veut la loi; c'est le contraire qui apparait.

Pour toutes ces raisons, la cour confirme le jugement de la cour de première instance et renvoie l'appel avec dépens.

Judgment confirmed.

Lacoste, Globensky, Bisaillon et Brosseau for the appellant.
Préfontaine et Lafontaine for the respondent.
(J. K.)

November 27, 1883.

Coram DORION, C.J., RAMSAY, J., TESSIER, J., CROSS, J., BABY, J.

LA CORPORATION DU COMTÉ D'OTTAWA,

(*Defendant in the Court below,*)

APPELLANT;

AND

LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA ET OCCIDENTAL.

(*Plaintiff in the Court below,*)

RESPONDENT.

Nominal Damages—Breach of Contract.

Held, (DORION, C.J., and CROSS, J., dissenting) that under the law in force in the Province of Quebec nominal damages, to the amount even of $100, may be awarded for breach of contract where there is no proof of actual damage.

2. That the obligation of a municipality to issue debentures in payment of a subscription of shares in a railway is not to be regarded as equivalent to a mere obligation to pay money, in which case under C. C. 1077, the damages resulting from delay would consist only of interest from the day of default.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), 18th April, 1882, (reported in 26 Lower Canada Jurist, p. 148; 5 L. N. 132.)

DORION, C.J. (*diss.*) :—

On the 12th of June, 1871, the Municipal Council of the County of Ottawa passed a by-law authorizing the warden of the County to subscribe for twenty thousand shares, of ten dollars each, in the Northern Colonization Railway, to be paid for in debentures, at twenty-five years' date. One hundred and fifty thousand dollars of which were to be issued as the work progressed, but not to exceed one-half of the money expended on the works made in the County of Ottawa, nor three thousand dollars per mile, the balance of fifty thousand dollars to be issued when the road should be completed from Montreal to Ottawa.

On the 19th of January, 1875, the respondents claimed from the appellants debentures for $112,096, being the amount of one-half of the monies they had expended on

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fifty miles of railway in the County of Ottawa, and on the 19th of June following they instituted the present action, by which they claim from the appellants damages to the amount of $500,000, on the following specific grounds alleged in their declaration:

1. That, by the refusal of the appellants to issue their debentures according to their agreement, the respondents are unable to complete their railway.

2. That by such refusal they are exposed to lose the balance of $50,000, which are to be issued after the railway is made from Montreal to Ottawa, provided it be completed before the first day of December, 1875.

3. That the credit of the Company has been injured by such refusal, and that respondents have thereby been deprived of large sums of money which they were entitled to receive from the City of Montreal and from the Province of Quebec.

4. That the respondents have the right to claim interest since the 19th of January, 1875, on the amount for which debentures should have been issued in their favor.

The appellants demurred to the declaration, and also filed a peremptory exception and a *défense en fait*.

The demurrer was dismissed, and the appellants have been condemned to pay $100 for the several damages suffered by the respondents.

The appeal is from this judgment. By the agreement entered into between the parties the appellants became shareholders in the Company now represented by the respondents, and agreed to pay their stock, not in money, but by the issue of their debentures, subject to certain conditions mentioned in their by-law. Taking for granted that the respondents have fulfilled all their obligations to entitle them to claim the $112,096 of debentures, the appellants would be in the position of a stockholder refusing to pay calls on its stock when such calls have been made and have become payable.

If these calls had been payable in money, the respondents would be entitled to claim the amount of the calls due, together with interest thereon from the date of the

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demand, interest being the only compensation a creditor can obtain for the detention of a sum of money which his debtor refuses to pay (art. 1077 C.C.)

Corporation debentures are not money, but mere promises to pay according to the terms on which they are issued. Their actual value may be greater or less than their face value, according to the rate of interest they bear and the credit of those by whom they are issued.

The only claim the respondents were entitled to urge against the appellants was a claim for the amount of debentures earned or their value, at the time they should have been issued, with interest and costs.

The loss of credit, the failure of a creditor to fulfil his engagements generally, because his debtor has not fulfilled his undertaking, have never been considered as being an element in the estimate of the damages to be allowed by a court of justice.

The bad example given by a defaulting debtor, which encourages other debtors to become defaulters, is still a more remote cause which can neither give rise to nor support a claim for damages.

The respondents have not adduced any evidence whatsoever that they had suffered any actual loss by the default of the appellants to issue their debentures. They have neither proved the value of those debentures, nor even that their enterprise was a profitable one, which seems to be the gist of their claim.

The only evidence adduced by the respondents consists in the loose and speculative opinions of witnesses, most of whom are connected with the railway, and who estimate the damages suffered by the respondents at from $150,000 to $400,000, without in anywise explaining how such enormous damages could have arisen from a failure on the part of the appellants to issue $112,096 at the time agreed upon. It is evident that the Court below was of opinion that such wild estimate could have no substantial basis, for, instead of hundreds of thousand dollars it merely allowed one hundred dollars for the pretended damages of the respondents. There is far less evidence

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for a judgment for $100 than for one of two or three hundred thousand dollars. There is not the slightest justification to be found in the record for the finding of the Court. The three first grounds on which the action is based are totally unfounded in law. As to the fourth, which is the claim for interest, it is difficult to understand how interest can be claimed apart from the claim for the debentures on which this interest was to accrue, and neither debentures nor their value, which might include interest, are here claimed.

Moreover, by comparing the date at which the debentures were first claimed, which is the 19th of January, 1875, and the date of the action, 10th of June, 1875, it will be found that only five months had elapsed between those dates, and the first interest payable on the debentures would only have become due on the 19th of July following, as, according to the agreement, the interest on the debentures was payable every six months, reckoning from their date. Supposing the action could be considered as an action for interest it would have been premature.

The Court below did not consider it an action for interest, since it only allowed $100, while interest alone would have amounted to several hundred dollars.

It has been said that the judgment might be considered as awarding mere nominal damages for breach of contract.

As I understand the rule in England an action will lie for a mere breach of an agreement, although no loss or injury may have resulted from such breach, but in such cases the party suing will only be awarded a very small sum, as a farthing, a penny, or sixpence, and this is what is termed nominal damages (Sedgwick on the Measure of Damages, pp. 44, 45, § 47). If this view be correct I do not think that $100 would in England be considered as being nominal damages.

Whatever may be the law of England, this case has to be determined according to the rules of the French law, as applied in this Province, where an action does not lie for a mere breach of a contract where the complainant has suffered no actual loss nor been deprived of any gain by

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such breach. The words nominal damages or their equivalents are not to be found in the French law-books, at least in connection with claims for a breach of contract. The plaintiff must prove that he has suffered some damages from the breach of covenant complained of, in which case he will succeed, otherwise his action will be dismissed.

It is *injuria sine damno* for which there is no right of action. The only exception to this rule is where damages have been stipulated by the parties as provided for by Article 1076 C. C. or fixed by law, as in the Art. 1077 C. C., which allows interest as damages resulting from delay in the payment of money, the Article adding: "without the creditor being obliged to prove any loss," which shows that in other cases a loss must be established, and Art. 1073 C. C. says that the damages due to the creditor are in general the amount of the loss he has sustained and of the profit he has been deprived of. We may therefore safely say that an action does not lie here for merely nominal damages, and the maxim *de minimis non curat lex* is especially applicable to vexatious actions of damages, which can have no practical results, the policy being rather to discourage than to promote such actions.

I would have reversed the judgment of the Court below and dismissed the respondent's action on the twofold ground that the declaration discloses no right of action, and that the respondents have not proved that they had suffered any loss or damage for which the appellants could be held liable, but being in the minority the judgment will be confirmed.

CROSS, J. (*diss.*):—

In this action instituted 19th June, 1875, the respondents sought to recover from the appellants five hundred thousand dollars damages which they claimed on their representation of facts to the effect following:

That the appellants were subscribers to the capital stock of the respondents' railway to the extent of twenty thousand shares of ten dollars each, amounting to two hundred

thousand dollars, which had been subscribed for under the authority of a by-law of the appellants containing the conditions following:

1. That the subscription would be payable in debentures of the Corporation of $100 each, payable at twenty-five years from then date, and bearing interest at the rate of six per cent. per annum, and to be taken by the company at par in payment of their subscription.

2. There should be payable monthly $—— on the subscription in proportion as the work progressed, but so as not to exceed half the value of the work done on the road within the limits of the County nor the sum of $3000 per mile.

3. To construct the bridges on the principal rivers with stone piers and to use steel rails of forty-eight pounds weight per yard, and to build the road and its dependences equal in quality and material and in construction to the railroad called the St. Lawrence and Ottawa Railroad.

4. To finish said railroad and put it in operation on or before the 1st December, 1875.

That in March, 1875, work had been done on said railway within the limits of the County of Ottawa to the value of three hundred thousand dollars on a length of road of fifty miles, and that in January of that year the work had attained to the extent to entitle the Railway Company to claim from the appellants $112,096, and on the 14th June, 1875, a notarial demand was made to the appellants for the delivery of debentures for this amount, which the appellants refused; that they, the Railway Company, were prepared to continue the works on the terms of the by-law and to finish it by the first of December then next, 1875, on the condition that the appellants would on their part fulfil the conditions of their said by-law.

That the refusal, negligence and omission of the appellants to deliver to the respondents their debentures to the above amount had caused and was causing considerable damage, not only by putting in peril the payment of said

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sum of fifty thousand dollars, but also by injuring the credit of the respondents and depriving them of considerable sums that the respondents would have had the right to receive and would have got and received, as well from the city of Montreal under and in virtue of by-law No. 59, Schedule A of the Act, 36 Vic. c. 49, as of that of the Government of Quebec, from and out of the subsidy voted to the respondents by and in virtue of the Act of Quebec 37 Vict., cap. 2, and that besides these damages the respondents had the right to claim from the appellants interest on the amount of debentures from the date of the protest 19th January, 1875.

The appellants demur to this answer.

1. Because it was for damages for loss of credit and for non-delivery of debentures.

2. The only thing respondents could claim was the delivery of the debentures or their value in money.

3. The only obligation of the appellants was the payment of money and interest which respondents did not claim.

4. Apart from the demand the appellants would still remain liable for the debt and interest.

They further pleaded that the respondents had not fulfilled the conditions of the by-law, they were insolvent, and had declared their inability to complete the road within the prescribed delay. That they had not paid for the lands taken for the road, had never had the required capital *bona fide* subscribed, no calls had been paid, the subscriptions of the municipalities were conditional and could not be enforced. The charter had been changed from that of a Provincial to a Dominion one, to which appellants had not consented and were not bound; that respondents could not claim for damages and could only have claimed money and interest.

The Attorney General for Quebec intervened, claiming that the railroad, the rights of the respondents, the contractor and the subscribers of stock had all been transferred to the Quebec Government by a conveyance executed before Dumoulin, Notary, the 2nd November, 1875, of

which they produced a copy. By this conveyance it appeared that the Government had taken over the property of the railroad, and assumed the liabilities of the company, undertaking, besides, to reimburse what subscribers had paid on their shares.

The agreement was ratified by the Quebec Act. 39 Vic. c. 2. This intervention was contested by the appellants as illegal, unconstitutional, and as operating no valid change in the condition of the parties.

After evidence taken on the whole case the intervention was discontinued.

On this state of the case and on the evidence, the Superior Court pronounced its judgment on the 18th April, 1882, whereby it was declared "Considering that the plaintiffs (respondents) have proved that on the 17th day of January, 1875, they had fulfilled the conditions at that time incumbent upon them under the by-law of the Municipal Council of the County of Ottawa set forth in the pleadings in this cause to be entitled to the delivery of the bonds or debentures claimed by their protest of that date served upon the defendants (appellants);

"Considering that defendants (appellants) have failed to make sufficient evidence in support of the allegations of their second plea to entitle them to the maintenance thereof and the dismissal of plaintiffs' (respondents') action;

"Considering that plaintiffs (respondents) have sufficiently proved the allegations of their declaration to be entitled to general damages for the default of the defendants (appellants), as set forth in their protest of date the 17th January, 1875, which damages the Court now assesses at $100;

"Doth over-rule defendants' (appellants) said plea, and condemn them to pay to plaintiffs (respondents) the said sum of $100, with interest thereon from this date and and costs of suit as in a first-class action."

This judgment, the validity of which is brought in question by the present appeal, assumed that the appellants are liable in damages outside and beyond the capital and interest of the debentures, which, in accordance with

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the conditions of the by-law and of their subscription, they undertook to deliver as the work progressed.

These consequential damages are claimed on the ground that the default of the appellants to deliver the debentures caused injury to the respondents' credit, and deprived them of considerable sums which they would have received from the city of Montreal and in subsidy from the Government of Quebec.

The appellants deny that any such damages are recoverable by law.

The respondents on their part contend that interest for delay is not the sole damage that the creditor can claim from his debtor in case of the non execution of an obligation for the payment of a sum of money; that there may be other causes of damages than the delay, and in such case the tribunal has the right to estimate and determine the damage which the creditor actually suffers.

To sustain this proposition they invoke *arrêts* of the courts in France in cases arising under art. 1175 of the Code Napoléon, which it is claimed is of the same purport as our art. 1077; also the views of the jurists in France on the interpretation of the same article. They have likewise cited one or two English authorities.

I would here remark that we have no such rule here as that which prevails in England, of giving nominal damages for a breach of contract although no actual damage results or is proved, whatever effect that might have on a case like the present, nor do we follow a practice prevailing in France of awarding what are termed "*dommages et intérêts*" for obstructing legal recourse, as in the case of making in bad faith an unfounded opposition to the execution of a judgment. This rule accounts for some of the French *arrêts* where damages were given in consequence of unfair obstruction opposed to a well founded demand; others are based upon the circumstances of the case shewing another legal ground for damages besides the mere delay of payment. I find none strictly applicable to the present case. The most appropriate of the English authorities is the case of the breach of an agreement to accept

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bills of exchange to a certain amount in consideration of a commission to be paid for the acceptance; but besides that bills of exchange are expressly excepted from the operation of art. 1077, an agreement to accept is one of a very special nature, and is to some extent an agreement to sustain the credit of the drawer; I do not consider it applicable.

Although not prepared to deny that there may be a case where the delay of payment of money might possibly involve damages beyond the interest of the sum withheld, it seems to me it must be an exceptional one, and before the respondents could be entitled to the application of other than the general rule contained in art. 1077 it would be incumbent on them to show that there really existed such an exceptional case recognized by law, and that it was the present case, which I think they have failed to do.

On the other hand authorities more or less satisfactory have been cited in support of the pretensions of the appellants, see:

Code C. B. C. art. 1077.

1 Larombière Oblig. on Art. 1153 C. N. p. 565, 566.

Arrêt de Cassation, 13 January, 1852.

Fouquet Besselièvre C. Basile.

Pothier Oblig. Nos. 144, 170.

6 Toullier No. 264.

10 Duranton No. 49.

4 Marcadé, art. 1153.

Journal du Palais, 1853, Vol. 2, p. 18, arrêt Dionest mentioned by Demolombe, Vol. 24, No. 585.

We find two *arrêts* cited by Sirey, Table Décennale 1851-1860, Nos. 17 and 18, which seem to indicate that damages can be obtained beyond interest. The first is reported in the "Journal du Palais," 1855, Vol, 2, p. 555, arrêt Desseroy, where damages were claimed for chicanes and vexations, but the reporter states: "But it would be otherwise if the condemnation was founded on a prejudice caused only by the delay in payment." The second is the *arrêt* mentioned by Demolombe, Vol. 24, where the

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execution of a contract was in question.

Sirey, Table Décennale Vo. Dommages-intérêts, No. 27. 1 Larombière p. 565-570, No. 10.

I think the case is controlled by the Art. 1077. I can see no sufficient reason for departing from the sense of the text or excluding the present case from its operation. I think it would be extremely dangerous to do so; it would be embarking on an unlimited sea of expansion in the estimate of damages which the law has wisely closed; it would be admitting of a latitude where the measure would be wholly arbitrary and the results in some cases possibly oppressive.

I would be disposed to deny the respondents' right of action in the present case; I would reverse the judgment of the Superior Court and dismiss respondents' action.

RAMSAY, J.:—

This appeal gives rise to a question of some interest and some novelty. The County of Ottawa agreed to take 200 shares in the stock of the Company respondent, to pay for them by debentures bearing interest at six per cent., on certain conditions. These conditions were complied with, but the Company, on demand, refused to deliver the debentures. This appears to have deranged the affairs of the Company respondent, and to have done the respondent great damage. The respondent sued the appellant in damages, and was met by a demurrer, taking up the ground that this was an undertaking to pay money, and that the only damage for the delay in the payment of money was interest at the legal rate.

The demurrer was dismissed—we are not told why—but I think there is no difficulty in suggesting more than one good reason for its dismissal. The whole question came up on the merits, and the learned Judge in the Court below awarded the respondent $100 damages. In doing so he adopted a principle which was insisted on by the learned counsel for the respondent before this Court, and which he supported by a very respectable array of authority. It is this—that article 1077 C. C. only provides that the damages for the "delay in the payment of money con-

sist only of interest," etc., "*ne consistent que dans l'intérêt*" —and that therefore there may be other damages for the non-payment of money. It is said this article is borrowed from Art. 1153 C. N., and that the writers under this article in France have held that there may be other damages than interest where money has not been paid. It is proper to remark that the *rédaction* of 1153 C. N. is very different from that of Art. 1077 C. C. Art. 1153 is in these words: "Dans les obligations qui se bornent au paiement d'une certaine somme, les dommages et intérêts, résultant du retard dans l'exécution, ne consistent jamais que dans la condamnation aux intérêts fixés par la loi."

I do not, however, attach much importance to this difference of *rédaction*. It seems to me to establish a distinction almont inappreciable, and one which it is evident the Codification Commissioners did not see. They say, p. 18, 1st Rep: "The section intituled, 'of damages' "resulting from the inexecution of obligations, contains "articles numbered from 90 (96) to 98 (103), which, with "some changes of expression and difference of arrange- "ment, embody the rules contained in the articles of the "French Code, numbered from 1145 to 1154, and declare "the existing law."

If I have understood the meaning of the French writers cited by respondent, it is this: that article 1153 C. N. limits the damages arising from the delay to pay money to legal interest only, when the obligation is limited to the payment of money; but that when the payment of money is portion of another substantial contract, then all the damages resulting indirectly from the delay can be exacted. This is ingenious, but very forced, and it is absolutely inadmissible under the *rédaction* of our article 1077. The opportunity of setting the legal mind astray on this question arises from the weakly pedantic and false doctrine of article 1053 C. C., which is obviously incompatible with Art. 1074 to 1075 C. C. It is borrowed, with variations, from Arts. 1182 and 1183 C. N., which, in their turn, are even more forcibly in contradiction with Arts. 1150 and 1151 C. N. Whatever may be the origin of

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the idea which was expressed by the application of the three degrees of comparison to *culpa*, we have the advantage of knowing that 1053 C. C. was adopted to substitute a new basis for damages, under guise of re-asserting the true principles of law, 1st Rep., p. 18. How far the omission of the square brackets is justifiable it is not necessary now to enquire.

I am therefore of opinion that the failure to pay money at the proper time can only give rise to the immediate and direct damages resulting therefrom, and which are limited by law to the legal interest on the sum.

But the next question is, whether the obligation to give debentures bearing interest at 6 per cent is an obligation to pay money? Strictly speaking it is not; and I think we can hardly say it is an equivalent, as when commercial paper is given. Now the rule of Art. 1077 is one of positive law, and an exception to the general rule of article 1073 C. C. If Art. 1073 had stood alone, and without Art. 1077, damages for the delay to pay money would have been the loss the creditor has sustained. I am therefore to confirm. I think these remarks dispose of the whole argument as presented at the bar, but a new view is presented by the dissent, which it becomes important to consider, in order that it may not be supposed we have overlooked it.

Before doing so, I would, however, remark that reference was made to what I said in *Ansell & The Bank of Toronto*; but it will be remembered that the judgment went on the merits, and that I only put as a question whether that case was not within article 1077 as being equivalent to the payment of money.

I understand the argument of the learned Chief Justice to be this:

The damages sought to be recovered are specially for loss of credit, loss of prospective gains and interest; that on such a declaration no general damages could be given, not even nominal damages; that there was no such thing as nominal damages in the French law; that by that law all damages were real, and that the nominal damages of

the English law were a farthing on the shilling. It was further said that in England loose speculative opinions as to probable gains were considered as inconclusive and too remote. It was also said that there could be no damages by way of interest, for the action was taken out on the 19th June, and the *mise en demeure* to deliver the bonds was only on the 19th January, so that interest on the bonds was not due till July.

I quite agree with the Chief Justice, that if the Civil Code is to be taken as embracing all the principles of damages known to the French law these damages are not sustainable; but it is evident that the articles on damages in the Code are miserably insufficient. I do not see how any one who has read Pothier and the old authors on the subject can arrive at the conclusion that there were no nominal or exemplary damages under the old French law when positive proof of loss was impossible. At all events, it is pretty late in the day to set up such a doctrine, for we have here been giving exemplary damages, damages estimated by the Court, and nominal damages, ever since I have known anything of the matter. I never heard the right questioned before, except by a once well-known citizen, who made it a charge against Judge Aylwin that he had given some small damages as recognition of the right of action, although no real damage was positively proved. I don't think the criticism produced much impression. If nominal damages can only be a farthing or a shilling, then nominal damages for personal wrongs cannot carry costs. (478 C. C. P.) If, again, these debentures are considered as money, or equivalent to money, what has been allowed, $100, is far less than the interest on $112,000 from 17th January to 19th June. To say that interest *as damages*, could not be due because the interest on the debentures was not due till July appears to me as a fallacy. The interest on the debentures could never be due, because they never were issued. Our article only says that interest is the measure of damage for non-payment of money. It does not surely mean that the damage may not be asked for with the demand.

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It has also been said that if the judgment is good it is for too little. That is hardly a ground of appeal in the mouth of the party condemned. It seems to me that the judgment is highly equitable and just, and is perfectly in accordance with the law, and that is the opinion of the majority of the Court. The appeal will, therefore, be dismissed with costs.

Judgment confirmed.

Laflamme, Huntington, Laflamme & Richard, for appellant.
De Bellefeuille & Bonin, for respondent.
(J. K.)

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19 novembre 1884.

Coram DORION, J.C., MONK, RAMSAY, TESSIER et CROSS, JJ.

HENRY HOGAN,

(*Demandeur en Cour Inférieure*),

APPELANT,

ET

LA CITÉ DE MONTRÉAL,

(*Défenderesse en Cour Inférieure*),

INTIMÉE.

Taxes municipales—Contribuables—Promesse de vente.

Par acte du 4 novembre 1873 C. obtint du gouvernement fédéral une promesse de vente d'un immeuble situé dans la cité de Montréal, dont la possession ne devait lui être donnée que sous certaines conditions mentionnées à l'acte. Le 25 octobre 1875 C. vendit et transporta à l'appelant tous ses droits résultant de la dite promesse de vente. Les conditions stipulées ne furent remplies et la possession de l'immeuble ne fut donnée à l'appelant que le 1er novembre 1876, et il n'obtint son titre que le 4 novembre. Le rôle annuel de cotisation pour l'année civique commençant le 1er mai 1876 fut parachevé et déposé au bureau du trésorier de la cité le 28 septembre 1876, et sur ce rôle l'appelant était mentionné comme contribuable pour l'immeuble en question.

JUGÉ:—1o. Que les taxes municipales dans la cité de Montréal ne sont pas payables jour par jour, mais sont indivisibles, et sont dues par le

propriétaire et possesseur de l'immeuble sujet à cotisation au temps de l'imposition de ces taxes.

2o. Que l'appelant n'est devenu propriétaire de l'immeuble en question que le 4 novembre 1876, et que le gouvernement fédéral en a été le propriétaire jusqu'à cette date.

3o. Que par conséquent, les propriétés du gouvernement n'étant pas sujettes aux taxes municipales, l'immeuble en question n'était pas susceptible d'être taxé le 28 septembre 1876, date de la mise en vigueur du rôle de cotisation pour l'année civique commençant le 1er mai 1876; et l'acquisition subséquente de l'immeuble par l'appelant ne l'a pas rendu contribuable pour aucune partie des cotisations pour cette année.

4o. Que le fait que l'appelant avait été cotisé et taxé sur le rôle de cette année, et qu'il ne s'en était pas plaint de la manière réglée par la charte de la cité, ne pouvait pas le rendre contribuable pour ces taxes.

DORION, J. C.:—

Le 4 novembre 1873, par acte de cette date, il est intervenu une promesse de vente entre le gouvernement de la Puissance du Canada et Maurice Cuvillier, par laquelle le gouvernement a promis de vendre et Cuvillier d'acheter une propriété située au coin des rues St-Jacques et St-François-Xavier, dans la ville de Montréal, alors occupée par l'ancien bureau de poste, Cuvillier ne devant avoir possession que lorsque le gouvernement occuperait le nouveau bureau de poste projeté, et sous la condition que le gouvernement achèterait le terrain occupé par la Banque du Peuple et y construirait un nouveau bureau de poste. Le 25 octobre 1875 Cuvillier a vendu, cédé et transporté à l'appelant tous ses droits et intérêts résultant de la dite promesse de vente. Ce n'est que vers le 1er novembre 1876 que l'appelant a obtenu possession de l'ancien bureau de poste, et le titre n'a été passé que le 4 novembre. Le rôle de cotisation pour l'année commençant le 1er mai 1876 a été déposé au bureau du trésorier de la cité et homologué le 28 septembre 1876, et il appert par ce rôle que l'appelant a été cotisé comme propriétaire du terrain en question pour une somme de $720. Sur le refus de l'appelant de payer cette somme, l'intimé a fait émaner une saisie-exécution contre ses meubles, et l'appelant s'est pourvu contre cette saisie par un bref d'injonction enjoignant la cité de suspendre ses procédés. Dans sa requête

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pour le bref d'injonction l'appelant relate les faits susmentionnés, et soutient que le gouvernement étant resté propriétaire de l'immeuble en question jusqu'au 4 novembre 1876, et les propriétés du gouvernement étant par l'Acte de l'Amérique Britannique de 1867, exemptes de taxes municipales, la cotisation imposée le 28 septembre 1876 n'a pas pu frapper cet immeuble; et que, la taxe étant indivisible et annuelle, n'est exigible que du propriétaire au temps de l'imposition de la taxe.

La Cour Supérieure a bien interprété l'effet de la promesse de vente du gouvernement à Cuvillier, et a jugé que Hogan, cessionnaire de ce dernier, n'est devenu propriétaire de l'immeuble que lorsque les conditions stipulées ont été remplies, c'est-à-dire quand Hogan a été mis en possession et a obtenu son titre le 4 novembre.

Mais le savant juge a décidé sur l'autre point que la taxe est divisible et s'acquiert jour par jour, et il a en conséquence cassé le bref d'injonction et condamné l'appelant à payer la proportion des taxes pendant son occupation, c'est-à-dire depuis le 1er novembre 1876 jusqu'au 1er mai 1877.

Nous ne partageons pas cette opinion, et nous sommes unanimes à décider que la taxe est annuelle et indivisible, et qu'elle est due par celui qui est propriétaire lors de l'imposition de la taxe. Cette question a déjà été décidée plusieurs fois dans ce sens par les tribunaux du Haut Canada, et le principe paraît être bien établi. Lorsqu'une propriété est vendue au shérif dans le courant de l'année et après la mise en vigueur du rôle de cotisation, je ne me rappelle pas qu'on ait jamais prétendu faire payer une proportion des taxes par l'adjudicataire. L'acquisition subséquente ne peut en aucune manière rendre l'acquéreur responsable de la taxe imposée avant qu'il soit devenu propriétaire. Dans le cas actuel, le propriétaire lors de l'imposition de la taxe n'était pas sujet à cotisation, et par conséquent la municipalité ne pouvait réclamer aucune taxe pour cette année. Pour ces motifs nous croyons que le jugement de la Cour Supérieure doit être infirmé.

RAMSAY, J.:—

I concur in the reasons given by the chief justice. It seems to me that the whole question turns on whether the deed from the government to Cuvillier transferred the property to him, or was only a *promesse de vente* not followed by tradition. The Court below holds, and I think rightly, that it was merely a *promesse de vente*, and that when the tax was imposed it was still the property of the government.

But a curious pretention is put forward by the corporation respondent. It is contended that the property being taxed in the name of appellant, he did not complain within the proper delay; that this delay is final and that he cannot complain now. Not very long ago we had to deal with the pretention that under this law a man who was assessed upon property which did not belong to him could not complain. This is the other extreme. But the Court is not disposed to rush into either.

We did not hold that the man altogether improperly taxed could not complain, and we cannot hold that the imposition of a tax on property not liable to taxation becomes valid because the person named as owner becomes so subsequently. In other words, Mr. Hogan is no more liable than if a stranger had acquired the property from the government.

CROSS, J.:—

To my mind the liability to taxes was determined by the delivery of the property. So long as the Crown held the property for its use it was not liable to taxation. The deposit of the assessor's roll is the culminating exercise of the taxing power by which it becomes effective. Its deposit could not affect property which was not taxable, being then still by the terms of the title and *de facto* possessed by the Crown. The proceeding, as far as Hogan was concerned, was an absolute nullity. No such tax could affect the property until another assessment was made, and a roll deposited after the property had become taxable.

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Le jugement formel est dans les termes suivant :

" La Cour.....

" Considering that by memorandum of agreement of the 4th of December 1873, the government of Canada promised to sell to Maurice Cuvillier the property corner of St. James and St. François Xavier streets, then occupied as the Montreal post-office, in case the government should purchase the property of La Banque du Peuple to build a new post-office building, and on condition that the intended purchaser Cuvillier should only get possession after the new building was completed and the government had obtained possession of it ;

" And considering that the government of Canada retained possession of the said property up to the first day of November 1876, and that the respondent as the *ayant cause* of Maurice Cuvillier only became proprietor of the same by virtue of the deed of sale passed on the fourth day of November 1876 ;

" And considering that when the assessment roll for the City of Montreal for the civic year of 1876 was completed on the 28th September 1876, the appellant was neither the proprietor, the occupant, nor in possession of said real estate, but that the same was occupied and possessed by the Dominion Government as the proprietor thereof, and that said property was exempt from municipal taxes ;

" And considering that the appellant was not liable for any taxes on said property and that his name was wrongfully inserted in the said assessment roll for the year 1876 as the proprietor of said property ;

" And considering that the municipal taxes imposed on real estate in the city of Montreal are due and payable by the owners and occupiers thereof at the time they are imposed ;

" And considering that the appellant who was neither the owner, nor occupier of said property was not bound to take any notice of the assessment so illegally imposed on said property when it was exempt from taxation ;

" And considering that his subsequent acquisition of said property does not deprive him of the right to com-

plain of the illegality of such assessment and to demand that the Recorder should be prohibited from levying the amount of said municipal tax;

"And considering that there is error in the judgment appealed from, to wit the judgment rendered by the Superior Court at Montreal, on the 16th day of June, 1883, quashing the writ of prohibition in this cause issued;

"Doth reverse" &c.

Jugement infirmé.

Judah & Branchaud, pour l'appelant.

Rouer Roy, C.R., & Ethier, pour l'intimée.

(E. L.)

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26 novembre 1884.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS & BABY, JJ.

P. A. A. DORION,

(*Défendeur en Cour Inférieure,*)

APPELANT;

ET

J. B. T. DORION,

(*Demandeur en Cour Inférieure,*)

INTIMÉ.

Reddition de Compte—Motion pour rejet de Compte—Procédure.

JUGÉ:—1o. Que lorsqu'un défendeur poursuivi pour un état de compte de la gestion d'un immeuble et pour une somme réclamée sur la vente de cet immeuble en vertu d'une convention spéciale, plaide au premier chef de l'action qu'il n'a jamais été mis en demeure de rendre compte, mais qu'il a toujours été prêt à le faire, et produit son compte avec le plaidoyer; et plaide au second chef de l'action, qu'il ne doit rien au demandeur en vertu de la convention alléguée; le compte accompagnant le plaidoyer ne sera pas rejeté sur motion comme ayant été produit irrégulièrement et prématurément.

2o. Qu'un tel compte ne peut pas être rejeté sur motion avant l'enquête parce que le chapitre des dépenses contient des items qui ne parais-

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sent avoir aucune connexité avec la gestion de la propriété dont on demande compte: cette question ne pouvant être discutée et décidée que sur un débat de compte.

DORION, J. C.:—

L'appelant est poursuivi par l'intimé en reddition de compte. La déclaration allègue que l'intimé était propriétaire et en possession des deux-tiers, et usufruitier ou grevé de substitution sa vie durant du troisième tiers, d'une maison située sur la rue Notre-Dame, dans la ville de Montréal, et que depuis une vingtaine d'années l'appelant a géré et administré cette propriété pour lui en qualité d'agent et procureur, et en a retiré tous les loyers dont il n'a jamais rendu compte à l'intimé. La déclaration allègue encore que, par acte du 28 novembre 1879, l'intimé a vendu à l'appelant cette propriété au prix de $8,000, dont deux tiers payables à l'intimé de la manière stipulée au dit acte, et l'intérêt sur le troisième tiers payable à l'intimé, sa vie durant; et que par un autre acte passé entre les parties le même jour il fut convenu, 1o. que la dite vente ne devait en aucune manière préjudicier au droit de l'intimé de se faire rendre compte des loyers jusqu'alors perçus par l'appelant; et 2o. que si l'appelant vendait cette propriété à un prix plus élevé que celui qu'avait payé l'intimé, dans le cours d'un mois, il devait lui en rendre compte et lui remettre le surplus à sa demande. L'intimé ajoute que l'appelant a vendu la propriété pour $14,000 dans le mois qui a suivi les conventions précitées, mais qu'il a, dans le but de frauder l'intimé, différé d'en passer contrat jusqu'au 12 avril suivant. L'intimé réclame par conséquent les deux-tiers de ce surplus de $6,000, soit $4,000, et l'intérêt de l'autre tiers, soit $2,000, sa vie durant. Les conclusions sont pour une reddition de compte de la gestion de l'appelant pendant une vingtaine d'années, et pour le paiement du dit surplus de la vente de l'immeuble en question.

A cette action l'appelant plaide qu'il a toujours été prêt à rendre compte; que l'intimé a toujours été son débiteur; que cette action est vexatoire, attendu que l'intimé n'a jamais demandé de compte à l'appelant qui n'a jamais

refusé d'en rendre, mais au contraire a toujours désiré un règlement; et l'appelant produit un compte avec son plaidoyer, montrant une balance ou avance de compte en faveur du rendant de $27,198.19.

Quant au deuxième chef de l'action, l'appelant nie à l'intimé tout droit dans les bénéfices qu'il a pu faire, et ajoute que si l'intimé avait ce droit, il ne pourrait réclamer qu'une somme de $3,436 qui est plus que compensée par la balance du compte produit en faveur de l'appelant. Les conclusions de ce plaidoyer demandent que le compte produit soit déclaré bon et valable; que l'intimé soit déclaré redevoir à l'appelant la somme de $27,198.19; et que l'action soit déboutée avec dépens. Ce plaidoyer est suivi d'une défense en fait. Le 2 juin 1882, avant que la cause fut inscrite pour enquête, le demandeur intimé a présenté une motion pour faire rejeter le compte produit par le défendeur, pour les raisons suivantes :—

1o. Parce que le défendeur nie au demandeur le droit de porter la présente action dont il demande le renvoi et débouté.

2o. Parce que le défendeur plaide encore qu'il ne doit point compte au demandeur du profit qu'il a fait sur la vente de l'immeuble en question.

3o. Parce que la Cour doit prononcer sur ces deux points préjudiciellement à la production d'un compte incomplet, suivant le demandeur, et à la contestation d'icelui.

4o. Parce que le dit compte est irrégulier dans sa forme et non accompagné de pièces justificatives.

5o. Parce que le dit compte n'est pas dans le chapitre des dépenses, un compte des dépenses au sujet de la propriété en question seulement, comme dans le chapitre des recettes, mais comprend une foule d'autres affaires distinctes et séparées, sans connexité avec la présente demande, sans que le défendeur se charge des recettes correspondantes qu'il a faites d'autres biens du défendeur.

La Cour Supérieure a accordé cette motion pour les raisons suivantes :—

" Considérant que la dite motion du demandeur est suf-

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" fisamment appuyée par les raisons y mentionnées en " premier, quatrième et cinquième lieux, savoir : 1o. En " autant que le défendeur nie au demandeur le droit de " porter la présente action dont il demande le renvoi et " débouté ; " 4o. En autant que le compte produit par le " défendeur est irrégulier dans sa forme et non accompa- " gné de pièces justificatives ; et 5o. Parce que le dit " compte n'est pas dans le chapitre des dépenses, un " compte des dépenses au sujet de la propriété en ques- " tion seulement comme dans le chapitre des recettes, " mais comprend une foule d'autres affaires distinctes et " séparées, sans connexité avec la présente demande, et " sans que le défendeur se charge des recettes correspon- " dantes qu'il a faites d'autres biens du demandeur."

C'est de ce jugement que le demandeur se plaint, et nous avons à examiner les raisons alléguées dans la motion et maintenues par le jugement. Quant à la première raison, qui est basée sur le fait que le défendeur nie au demandeur tout droit d'action et demande le débouté de son action, tout en produisant un compte avec son plaidoyer, nous la trouvons insuffisante. Comme on l'a vu, il y a deux chefs à l'action du demandeur. Le premier demande un compte, et le second réclame une somme due en vertu d'une convention spéciale. Le défendeur plaide à l'encontre du premier chef qu'on ne lui a jamais demandé de compte, et qu'il a toujours désiré un règlement, vu que le demandeur lui est endetté. Il produit donc un compte, car quoiqu'il nie au demandeur le droit de l'actionner comme il l'a fait, il lui reconnaît le droit d'avoir un compte. Si les allégués du plaidoyer sur ce point sont vrais—si le compte n'a jamais été demandé, et si le demandeur doit au défendeur—l'action est vexatoire, et le défendeur a raison d'en demander le renvoi, tout en produisant son compte. Quant à l'autre chef de l'action, il est évident que s'il est vrai, ainsi que l'allègue le défendeur, qu'il ne doit rien au demandeur sur la vente de sa maison, cette partie de l'action est également mal fondée et doit être déboutée.

La seconde raison sur laquelle le jugement s'appuie est

que le compte est irrégulier dans sa forme et non accompagné de pièces justificatives. Nous ne pouvons pas déclarer ce compte irrégulier quant à la forme. Il contient des chapitres de recettes, de reprises et de dépenses, et une récapitulation, qui le rend très facile à comprendre, et susceptible de débat. Quant à l'absence de certaines pièces justificatives, le savant juge ne paraît pas avoir remarqué que le demandeur a abandonné ce moyen par une déclaration à cet effet au bas de sa motion pour faire rejeter le compte.

La dernière raison sur laquelle repose le jugement ne nous paraît pas mieux fondée. La prétention de l'intimé est que l'appelant, en rendant compte de sa gestion d'un immeuble particulier, ne peut faire entrer dans le chapitre des dépenses que ce qu'il a dépensé pour la propriété en question, et il se plaint de ce que le rendant compte a introduit dans ce chapitre une foule d'items qui sont sans connexité avec l'immeuble en question.

L'appelant répond avec raison que s'il a collecté les loyers de cet immeuble et employé l'argent à payer des billets ou des jugements pour l'intimé, il a certainement le droit d'être déchargé d'autant, et de faire figurer ces dépenses dans son compte. Autre est la question de savoir s'il a fait ces déboursés, ou s'il les a faits avec d'autres recettes que celles qui sont mentionnées au compte. Mais il est évident que ceci ne peut être discuté que sur un débat de compte. On remarquera que c'est avant l'enquête, et sur motion, que l'intimé veut faire rejeter le compte.

Il n'y a rien d'allégué ou de prouvé qui fasse voir que l'appelant ait eu la gestion d'aucun autre bien de l'intimé, ou qu'il ait jamais collecté ou perçu d'autres montants que ceux qui proviennent de l'immeuble en question. Par conséquent nous sommes d'opinion que le compte est bien rendu et que le jugement de la Cour Supérieure doit être infirmé.

Le jugement de la Cour est rédigé dans les termes suivants :

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" Considérant que l'intimé demandeur en Cour de première instance, demande par son action : 1o. un compte des loyers et revenus d'une maison que l'appelant défendeur en Cour de première instance a perçus pour lui ; 2o. le payement d'une somme de quatre mille piastres pour sa part des profits que, suivant une convention à cet effet, l'appelant devait lui remettre dans le cas où il vendrait cette maison dans le cours d'un mois, au-delà du prix que l'intimé la lui avait vendue, savoir à un prix plus élevé que la somme de huit mille piastres ;

" Et considérant que l'appelant a offert par son exception péremptoire le compte demandé par l'action, et que par ces conclusions il a demandé acte de la production de ce compte et qu'il a déclaré que l'intimé lui était redevable d'une somme de $27,198.19, et qu'il a, en outre, par la même exception contesté la demande de l'intimé de la somme de $4,000 formant le second chef de sa déclaration ;

" Et considérant que l'intimé demande par sa motion du 2 juin 1882 que le compte produit en cette cause par le défendeur appelant avec ses plaidoyers soit déclaré produit irrégulièrement et prématurément, et soit déclaré non avenu pour, entre autres, les raisons suivantes :

1o. Parce que le défendeur (appelant) nie au demandeur (intimé) le droit de porter la présente action dont il demande le renvoi et débouté.

2o. Parce que le défendeur plaide encore qu'il ne doit point compte au demandeur du profit qu'il a fait sur la vente de l'immeuble en question au nommé Walker.

3o. Parce que la Cour doit prononcer sur ces deux points préjudiciellement à la production d'un compte incomplet suivant le demandeur et à la contestation d'icelui.

4o. Parce que le dit compte est irrégulier dans sa forme et non accompagné de pièces justificatives.

5o. Parce que le dit compte n'est pas dans le chapitre des dépenses un compte des dépenses au sujet de la propriété en question seulement comme dans le chapitre des recettes, mais comprend une foule d'autres affaires dis-

tinctes et séparées sans connexité avec la présente demande et sans que le défendeur se charge des recettes correspondantes qu'il a faites d'autres biens du demandeur.

"Et considérant que l'appelant en produisant son compte avec ses défenses a par là même reconnu qu'il devait un compte des loyers et revenus qu'il a reçus pour l'intimé, et que sa contestation de l'action de l'intimé ne peut s'appliquer à la demande en reddition de compte à laquelle l'appelant a acquiescé en produisant son compte, mais aux autres conclusions prises par l'intimé;

" Et considérant que l'appelant en produisant son compte n'a fait que se conformer à la demande qui lui était faite par l'action de l'intimé, et que c'est à tort que la Cour de première instance a déclaré que ce compte a été produit irrégulièrement et prématurément;

" Considérant que le compte produit par l'appelant est dans la forme requise par le Code de Procédure, et que l'intimé s'est, avant le jugement de la Cour de première instance, désisté de son objection que le compte de l'appelant n'était pas accompagné de pièces justificatives;

" Et considérant que l'appelant n'était pas tenu de ne porter en dépenses que les sommes qu'il avait dépensées pour l'intimé au sujet de la propriété dont on lui demandait compte des loyers et revenus qu'il a perçus pour l'intimé, mais qu'il pouvait porter en dépenses toutes les sommes qui lui étaient dues par l'intimé, et qui pouvaient compenser celle qu'il reconnaissait devoir à l'intimé pour les fruits et revenus qu'il avait perçus;

" Considérant, de plus, que rien ne fait voir dans la cause que l'appelant ait reçu pour l'intimé d'autres sommes que celles qu'il a portées au chapitre des recettes de son compte, et que s'il en a reçu d'autres dont il soit comptable envers l'intimé ou qui doivent compenser ou détruire les charges faites par l'appelant dans le chapitre des dépenses de son compte, cela ne peut que faire la matière de débats de compte sur lesquels la Cour ne pourra adjuger qu'après une instruction régulière des prétentions des parties respectivement, et non sur une simple motion

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pour rejeter le compte produit par l'appelant ;

"Et considérant que les autres raisons invoquées par l'intimé pour faire rejeter le compte de l'appelant sont mal fondées ;

"Et considérant qu'il y a erreur dans le jugement interlocutoire rendu par la Cour de première instance le septième jour de juin 1882 ;

"Cette Cour casse et annule le dit jugement, etc."

Jugement infirmé.

Dalbec & Madore, pour l'appelant.
Geoffrion, C. R., conseil.
Pagnuelo & Lanctot, pour l'intimé.
(E. L.)

November 19, 1884.

Coram DORION, C.J., MONK, RAMSAY, CROSS and BABY, JJ.

THE MONTREAL, PORTLAND & BOSTON RAILWAY COMPANY,

APPELLANT ;

AND

HATTON,

RESPONDENT.

Appeal Bond—Security in Appeal—Condemnation under C. C. P. 1025.

Held, that on an appeal by the defendant from a judgment ordering a Railway Company to call the annual meeting within one month, or to pay a fine of $2,000, security for costs only is insufficient: the security must be to satisfy the condemnation.

J. L. Morris, for the respondent (Nov. 15), moved that the appeal be dismissed because of the insufficiency of the appeal bond. The circumstances were these: The annual meeting of the company, appellant, should have been held on the 16th January, 1884. The meeting was duly called,

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but just before the time of meeting it was stopped by an injunction. This injunction was contested and set aside. The directors were then notified to call the meeting as soon as possible. They neglected and refused to do so. A mandamus was then taken by the respondent, a shareholder, to compel them to comply with the law. This mandamus was contested, and the judgment now appealed from was rendered. [1] This judgment ordered the company to call the meeting within one month, or to pay the sum of $2,000. The company appealed, and on the appeal gave security for costs only. The pretension of the respondent was that under the terms of Article 1124 of the Code of Procedure the appellant is bound to give security that "he will satisfy the condemnation and pay all costs and damages adjudged," in case the judgment appealed from is confirmed. Here the appellant had not given security that he would satisfy the condemnation. An exception was put in to the decision of the prothonotary accepting security for costs only. The question was, had the appellant given security in the terms of the article of the code, that is to say, had security been given to satisfy the condemnation? The judgment was an alternative one—to call the meeting within one month, or to pay $2,000. It was submitted that the appellant should have given security to pay the $2,000.

M. S. Lonergan, for the appellant, contended that the judgment involved no money condemnation. The alternative referred to did not arise until the month had elapsed; and unless the judgment was confirmed by this court, and the company then refused to call the meeting, it would never become liable to pay this sum. The case of *Rochette & Ouellette*, 9 Q. L. R. 361, was relied upon.

C. A. Geoffrion, Q.C., for the respondent, in reply, submitted that the case cited did not apply. It was an appeal from a judgment in an action *en déclaration d'hypothèque*, and the Court held that the value of the immoveable was not to be taken as the amount for which security

[1] See report of case, M. L. R., 1 S. C. 69.

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should be given. Here there was a condemnation pure and simple for $2,000 if the meeting be not called, and the appellant was bound to give security to satisfy a condemnation for that amount.

DORION, C.J.:—

This was a motion by respondent to reject the security bond. The appeal is from a judgment on a writ of mandamus, ordering the company, appellant, to call a general meeting of the shareholders for the election of directors to replace those whose term of office had expired. In default of calling the meeting within thirty days the appellant was condemned to pay $2,000. The company has given security—not to answer the condemnation as it was required to do by law—but only for the costs of the appeal, and the bondsmen have justified to the extent of $400. The respondent moves that the bond be rejected, on the ground that the company should have given security for the condemnation, and that the sureties should have justified to the extent of $2,000. The case of *Rochette & Ouellette* has been cited by appellant, but it has no application whatever. In that case it was a hypothecary action, and the defendant had been condemned to *délaisser* the property within fifteen days or pay the amount of the debt. He gave security for the condemnation, and deposited the sum of $350 as security, and the Court held that the bond was sufficient. But there is a vast difference between the two cases. The property could not disappear and the respondent had ample security on it. In the present case, the Court is disposed to set aside the bond. The appellant will be allowed eight days to enter new security.

[Subsequently, the appellant having declared in writing (under 1124 C. P.) that the company does not object to the judgment being executed, the bond was allowed by consent to stand for the costs on the appeal.]

M. S. Lonergan for the appellant.

J. L. Morris for the respondent.

(J. K.)

May 21, 1884.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

THE ST. LAWRENCE AND CHICAGO FORWARDING COMPANY,

(*Defendant below*),

APPELLANT;

AND

THE MOLSONS BANK,

(*Plaintiff below*),

RESPONDENT.

Bill of Lading—Assignment—Custom of Trade.

Reynolds Bros. shipped from Toledo, a port in the United States, 16,500 bushels of wheat by schooner to Kingston, Ont., the cargo to be delivered as per address in the margin of the bill of lading as follows:—"Order Reynolds Bros.; notify Crane & Baird, Montreal, P.Q. Care of St. Lawrence & Chicago Forwarding Co.," implying that, although the voyage of the schooner ended at Kingston, the cargo was to be put in charge of the Forwarding Company, destined for Montreal, Crane & Baird to be put upon their diligence by notice for any interest they might have in the cargo. The schooner having arrived at Kingston, the Forwarding Company, the ordinary carriers for Crane & Baird, received the cargo and paid the lake freight to the master of the schooner. No new bill of lading was issued, but the agent of the Forwarding Company at Kingston, signed a receipt for the cargo across the face of the duplicate of the bill of lading. The respondents made advances on the original bill of lading, endorsed by the shippers, but the wheat had been previously delivered by the Forwarding Company at Montreal to the order of Crane & Baird, without the surrender of the original bill of lading.

The question was whether the appellants, the Forwarding Company, were held to the same obligations as if they had been signers of the original bill of lading, which the respondents contended had force and effect until the cargo reached its destination in Montreal, and whether the appellants as forwarders were bound to have demanded and secured the surrender of the original bill of lading on delivery by them of the cargo to the consignees.

Held, reversing the decision of the Superior Court (5 L. N. 6; 25 L. C. J. 324), that the bill of lading was fulfilled and became effete by the delivery of the wheat at Kingston, prior to the assignment of the bill of lading to the respondents.

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2. The negotiability of a bill of lading cannot be put upon precisely the same footing as a bill of exchange. An advancer on a bill of lading should exercise reasonable diligence as regards the cargo it purports to represent.

3. The alleged usage of trade, imposing the obligations incurred under the first bill of lading upon the carrier who accepts a cargo carried to an intermediate port to forward it to its final destination by an additional transit, so as to require such ultimate carrier to procure the surrender of the original bill of lading to free himself from responsibility, could not alter the established significance of the documents used, or the legal relations of the parties according to the facts of the case, or make liability depend upon obtaining the surrender of a document after it had exhausted its efficiency and ceased to have any operation.

The following is the written judgment of the Superior Court, (PAPINEAU, J.) from which the present appeal was taken (See 5 L. N. 6, and 25 L. C. J. 324 for report of the case in the Court below):—

" La Cour.....

" Considérant que la demanderesse a prouvé les principales allégations de sa demande, et spécialement que le blé en question en cette cause, a été transporté par la défenderesse, de Portsmouth, près Kingston, dans la Province d'Ontario, en vertu d'un contrat tacite ou verbal, qui n'était que la continuation du contrat contenu dans le connaissement Exhibit numéro deux de la demanderesse; que la défenderesse et ses employés n'avaient pas d'autre autorité, pour transporter ce grain de Kingston à Montréal, que celle contenue dans ce connaissement qui mettait la cargaison à ses soins, et qu'elle a accepté ce soin, et qu'elle a, en conséquence, fait le transport à Montréal avec l'entente qu'elle serait payée pour ce transport, au taux ordinaire du fret par le propriétaire de la cargaison, propriétaire dont la connaissance lui serait dévoilée au moyen de la production du connaissement en question qui indiquait que la cargaison devait être livrée à l'ordre de Reynolds Brothers, les chargeurs;

" Considérant que ce connaissement, tout en n'étant pas strictement conforme aux dispositions de la loi, était connu de la défenderesse qui en avait une copie pour son propre usage, et qui de fait s'y est conformée partiellement en

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transportant le blé à Montréal : Considérant que le dit connaissement était suffisant pour faire connaître à la défenderesse et à ses employés et officiers, que la cargaison n'était livrable qu'à l'ordre de Reynolds Brothers ou de leurs cessionnaires ;

" Considérant que la demanderesse est devenue, pour valable considération et par endossements réguliers, propriétaire d'une portion de la cargaison mentionnée dans le dit connaissement ; savoir de 15,500 boisseaux de blé de la qualité y mentionnée et valant $16,275 ;

" Considérant que la défenderesse n'a pas prouvé les allégations de sa défense, et spécialement qu'elle n'a pas prouvé avoir fait un contrat distinct et indépendant du dit connaissement avec Crane & Baird, à Montréal, pour le transport de la cargaison de Portsmouth ou Kingston, Ontario, jusqu'à Montréal, quoiqu'elle est spécialement alléguée avoir fait tel contrat distinct avec Crane & Baird, à Montréal ;

" Considérant que sur offre par la demanderesse de la remise du dit connaissement à la défenderesse, celle-ci a refusé de lui livrer les dits 15,500 boisseaux de blé qui sont la propriété de la demanderesse ;

" Considérant, cependant, que les différentes parties de cette transaction ont été faites avec un grand relâchement des règles propres à conserver l'ordre dans les affaires commerciales, et que les deux parties ont participé à ce relâchement qui a été la cause du présent litige ;

" Renvoie la défense de la défenderesse et condamne celle-ci pour les causes énoncées dans la demande, à livrer à la demanderesse, sous quinze jours de cette date, la quantité de 15,500 boisseaux de blé de la qualité mentionnée dans la demande et dans le connaissement, et qui sont la propriété de la demanderesse, et à défaut par la défenderesse de ce faire dans le dit délai, elle est condamnée à payer à la demanderesse la dite somme de $16,275 valeur du dit blé, avec intérêt sur cette somme à compter du 29 Décembre, 1880, jour de l'assignation et les dépens, excepté ceux d'enquête, distraits à Messieurs Abbott, Tait & Abbotts, avocats de la demanderesse, chaque

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partie payant ses frais d'enquête, en par la demanderesse payant les charges suivant le connaissement, lesquels sont de $1,240, dont $930 pour le fret de Toledo à Portsmouth, et $310 pour le fret de Portsmouth ou Kingston, dans la Province d'Ontario à Montréal susdit."

D. Girouard, Q.C., and *N. W. Trenholme* for the Appellant.

S. Bethune, Q.C., and *M. M. Tait, Q.C.*, for the Respondent.

The facts and arguments are fully stated in the opinions of the learned judges.

MONK, J. (*dissentiens*):—

This is an action for the recovery of the value of a quantity of wheat shipped from Toledo to Montreal via Portsmouth Harbor (Kingston) and the canals. It was shipped for the first part of its journey from Toledo to Kingston by a schooner called the "Falmouth," and by the terms of the bill of lading, the original of which was delivered to the shipper, and a duplicate or copy retained by the master of the schooner, the wheat was to be delivered to the order of Reynolds Brothers, the shippers, and by directions on the bill, the wheat was to be put into the care of the appellants at Kingston, for conveyance to Montreal. As the lake schooners do not usually come down the canals the ordinary practice is to tranship shipments of grain from western ports destined for Montreal, at Kingston, into barges, for carriage down the canals. The appellants are the owners of barges employed in this work. The cargo in question was transhipped at Kingston into one of their barges, and they gave a receipt for it on the duplicate bill of lading so retained by the master of the "Falmouth," and they took a copy of the bill, and thereupon conveyed the wheat to Montreal. The respondents contend that the appellants, by receiving the cargo at Kingston under the circumstances stated, and by the custom of trade, contracted to carry the wheat in accordance with the terms of the bill of lading and to deliver it at Montreal to the order of Reynolds Brothers, or in other

words to the respondents who were the holders for value thereof, it having been duly endorsed to them, but which obligation they failed to perform, having delivered the cargo to Crane & Baird without production of the bill of lading.

The case was contested, and judgment was rendered in favor of respondents (plaintiffs in the Court below) and hence this appeal by the appellants. After a careful consideration of the facts established by the evidence adduced, and also of the law, as I understand it, and the custom of trade invoked by the respondents, I am forced to the conclusion, that I cannot concur in the decision about to be rendered by this Court. I have no hesitation in saying, that I would confirm the judgment of the court below. The first point to be considered and perhaps the most important in the case, is the question relating to the bill of lading, dated at Toledo the 28th August, 1880, which is expressed as follows:—

"Toledo, O., August 28th, 1880.

"Shipped, in good order and condition by REYNOLDS BROS., as agents "and forwarders for account and at the risk of whom it may concern, on "board the schr. "Falmouth," whereof S. D. Becker is master, bound "from this port for Kingston, Ontario, the following articles as here "marked and described, to be delivered in like good order and condition "as addressed on the margin, or to his or their assigns or consignees, "upon paying the freight and charges as noted below (dangers of navi- "gation, fire and collision excepted).

"IN WITNESS WHEREOF the said master of said vessel hath affirmed "to Two (2) Bills of Lading of this tenor and date, one of which being "accomplished, the other to stand good.

"Order — "16,500 bush. No. 2 Red Wheat.
"Reynolds Bros.
"Notify — "Freight to Kingston to be
"Crane & Baird, — "6c. per bush.
"Montreal, P. Q. — "S. D. BECKER,
"Care — "Master.
"St. Lawrence and Chicago Forwarding Company
"at Portsmouth Harbor near Kingston, Lake Ontario."

The following endorsements are found on the back of this original Bill of Lading which is filed by the respondents, the duplicate remaining in the hands of the Captain of the "Falmouth":

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" Reynolds Bros.

" D. Macphie, Esq.

" Deliver to Messrs. Beddall & Co., or order, fifteen thousand " five hundred (15,500) bushels of within cargo, we paying all freight " charges.

" Crane & Baird.

" Beddall & Co."

I take it as established beyond doubt, that the destination of the wheat when it left Toledo was Montreal, but as the lake schooners only run to Kingston, the usual course, well known and practiced for years, was adopted, of having it transhipped at Kingston into barges running between that place and Montreal, which are employed for that special purpose, and hence the direction on the bill of lading that the wheat was to be placed in the care of the appellants, whose business it is to run such barges.

The "Falmouth" arrived at Portsmouth Harbor on the 4th of September, 1880, with the wheat on board, and it was thereupon transhipped into a barge belonging to the appellants called the "Mohawk" for conveyance to Montreal. The duplicate or copy of the original bill of lading, which the master of the "Falmouth" had retained, was exhibited and communicated to the appellants' agent at Kingston who wrote across the face of it a receipt for the cargo, and took a copy of the bill. The original bill of lading was not produced at Kingston; nor was any order produced from Messrs. Crane & Baird. The cargo was delivered by the "Falmouth" to the Respondents in accordance with the directions in the bill of lading, and with the practice in respect of shipments of grain from western ports to Montreal; they received it in accordance with these directions, and with such practice, taking a copy of the bill of lading for their guidance; placed the cargo on board their barge, and conveyed it to Montreal.

To my mind it seems quite clear that, by acting thus, the Appellants assumed the obligations imposed upon the Captain of the "Falmouth" by the bill of lading of August 28th, 1880. It is quite true the "Falmouth" had performed her part of the voyage, and the contract with her had been fulfilled and had terminated. No one pretends

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the contrary, and in fact there can be no dispute on that point, but it must be borne in mind that the original bill of lading was still in existence—was unexhausted and in circulation; possibly it may have been in the hands of Crane & Baird; but as to the date when it was delivered to them, we have some loose evidence or vague suppositions, but no proof. One thing is certain, the appellants never saw the original bill of lading. Under the circumstances just adverted to, it seems to be mere trifling to hold that the original bill had ceased to exist, as regards the holder of the bill, the shipper, and also the appellants themselves.

The appellants performed their duty in carrying the wheat to Montreal; and that they should have been charged with doing so was in accordance with the intention at the time of the shipment at Toledo, and with the customary practice and usage in respect of such shipments already adverted to. But will it be for a moment pretended, that in doing so they had no duties to perform under the original bill of lading, upon a duplicate of which they had given a receipt for the cargo, and of which they had taken a copy for their guidance? that they were under no law or custom of trade, that in fact they had no obligations to fulfill towards any one? The answer to this I suppose is obvious—they were bound to notify the arrival of the wheat to Crane & Baird, according to the intention of their contract and to the custom and practice in such cases,—with the marginal direction on the original bill of lading they probably were bound to forward it in pursuance of that indication. But as they were bound to follow the order in the bill of lading, so far; were they not also obliged, did they not verbally or tacitly bind themselves to comply with it in another particular, viz, that the cargo should be delivered to the order of Reynolds Brothers, and upon that order only? This obligation on their part seems to me to admit of no doubt, and it in reality covers the whole case for the respondents; and in disregarding this injunction—in doing otherwise as they did, did they not do so at their own risk and peril?—

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Plainly they did. This is a point that admits of no discussion — our law — the custom of trade — and common sense, combine to make this view of the case as clear as any legal proposition can be and to my mind it is indisputable. It is in vain that we invoke the formulas of our code; that the deficiency in the proof of a custom of trade should be dwelt upon, or that misleading technicalities should be set up; this difficulty remains. As the appellants undertook to forward the wheat upon their own responsibility without a new bill of lading, they were to deliver the wheat to the order of Reynolds Brothers in conformity with the old bill.

Now, let us try to ascertain how far the appellants complied with this direction in the bill of lading. The following is the account given of it by Mr. Macphie, the principal shareholder and manager in the appellants' concern; at first, as it will be seen, in a very confused and hesitating way, for reasons which he gives himself and which are obvious:

Being asked the following questions, the picture he gives of the performance is rather peculiar for a man of business under these circumstances.

The answers must be taken together:

"*Question.* How did you deliver this quantity of fifteen thousand four "hundred and eighty-six bushels to Beddall & Co., this last quantity you "delivered on their account?

"*Answer.* They brought me an order from the office of Messrs. Crane "& Baird, and on that order I made the delivery.

"*Question.* Is it the same order which is produced in this case upon "the back of the bill of lading?

"*Answer.* No, that order never was presented.

"*Question.* And so actually you got two orders from Crane & Baird, "one on the back of the bill of lading?

"*Answer.* The position is this: The order given on the back of the bill "of lading appears to have been secreted, and when Beddall & Co. applied "for delivery of the grain, I asked them to bring me an order that would "be my authority for giving them the grain, and they kept back from "me any knowledge of having got a previous order and went to the office "of Crane & Baird, and obtained a second order and that second order "was the one upon which I delivered the grain."

In cross-examination he is very frank and clear in his answers, as follows:

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"*Question.* You say that the bill of lading, Plaintiffs' Exhibit No. 2, "was never produced?

"*Answer.* No, I say never—never within the time, not until this "demand of the Molsons Bank was made, long after the proper time.

"*Question.* When did you first see this bill of lading?

"*Answer.* About a month after the date referred to; I think about the "fourteenth of October, as near as I can remember.

"*Question.* You never saw it, then, in Crane & Baird's hands?

"*Answer.* No.

"*Question.* You do not know when Crane & Baird got possession of it?

"*Answer.* I know when they got possession of the property it repre- "sents.

"*Question.* But you never saw that bill of lading in their hands? and "you cannot swear the date at which they got possession of it, can you?

"*Answer.* No, but I can to the best of my belief declare that they had "it in their possession on the eleventh of September.

"*Question.* Do you know of your own personal knowledge, when they "had it in their possession?

"*Answer.* I cannot say.

"*Question.* The fifteen thousand five hundred bushels which you gave "to Crane & Baird, and which were put into the "Canadian," you gave "to them at their request, without the production of this bill of lading?

"*Answer.* Yes.

"*Question.* You are considerably interested in this case, are you not?

"*Answer.* Of course naturally.

"*Question.* How are you interested?

"*Answer.* I am one of the largest proprietors in the Forwarding Com- "pany, and I am manager of the Company, and I trusted to the honor "of people who have deceived me; that is how I am interested.

"*Question.* You have spoken of your interest in this suit; now is it "not a fact that you have reason to believe that you will, yourself, in "some measure, be held responsible for this claim should it go against "the Company, Defendant?

"*Answer.* That is a fact, but it does not affect my evidence.

"*Question.* No, I don't say that, but I merely examine you as to the "extent of your interest, and I am asking you whether it is not a fact "that if this claim goes against the Company, in all probability they will "call upon you to make good the loss to them?

"*Answer.* The probability is they will; yes.

"*Question.* Therefore, you are in the position of, perhaps, being held "responsible for this loss?

"*Answer.* There is no loss; I may be responsible for misplaced con- "fidence, for putting confidence in people who have betrayed it.

"*Question.* I am merely asking if it is not the case that in the event "the Defendant loses this suit you will be called upon, and expect to be "called upon to make this good? Is that not a fact?

"*Answer.* That is a fact. Of course I do not know how far the other "shareholders might proceed: their temper so far has been to make "me responsible, and I have not felt that I could recede from the respon- "sibility.

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"*Question.* Were they intending to make you responsible because "you delivered this grain without the production of the bill of lading?
"*Answer.* That is the idea, yes. It was an oversight on my part, it "was placing confidence in these people, and they deceived us."

This clear and explicit evidence is out of the mouths of the appellants themselves; and considering the position of Mr. Macphie, it reflects the highest credit upon the character and integrity of that gentleman. It amounts to almost an admission of all that is essential to the success of the respondents' case. But let us turn now to the facts more directly in issue between the appellants and the respondents; we will then see the significance and cogency of Mr. Macphie's testimony and also the justice of the foregoing remarks.

Reynolds Bros. had endorsed the original bill of lading, and delivered it to Crane & Baird. Crane & Baird thereupon endorsed it specially by an endorsement addressed to D. Macphie, the agent of the appellants, by which endorsement they required him to deliver to a firm doing business in Montreal under the style of Beddall & Co. 15,000 bushels of the cargo mentioned in the bill of lading, they (Crane & Baird) paying all freight charges.

Having endorsed the bill, Crane & Baird delivered it to Beddall & Co.

It is not proved when this latter endorsement took place, nor is the date of the delivery of it proved. But on the 14th September, 1880, Beddall & Co., being then the holders of the original bill, and being the owners of the 15,500 bushels of wheat, mentioned in the special indorsement by Crane & Baird to them, applied to the respondents at Montreal for an advance upon the security of the bill, and of the wheat therein mentioned. The respondents, in the usual course of their banking business, advanced $16,275 to Beddall & Co., who endorsed and delivered to the respondents the original bill of lading, as collateral security for the repayment of the advance. And they then also signed a memorandum, whereby they, in effect, acknowledged the advance, and the transfer of the bill of lading as security for its repayment; and

agreed that the said 15,500 bushels of wheat and the bill of lading, should remain pledged to the respondents as security for the advance, then made to them.

The respondents applied to the appellants for the delivery of the wheat, and exhibited to them the original bill of lading, and offered to surrender it upon the delivery of the wheat; and to pay all freight and charges lawfully due for the carriage of it. But the appellants declared, as the fact was, that they had already given up the wheat without production of the bill of lading, and they therefore refused to deliver the wheat to the respondents. Hence this action, for the recovery of the value of the wheat.

It must be borne in mind, as Mr. Macphie states, that the delivery of the wheat to Beddall & Co. was not made under the order of indorsement on the back of the bill of lading. Neither the bill of lading nor the indorsement on it were produced to the appellants: but the wheat was so delivered on a separate delivery order addressed by Crane & Baird to Macphie, the agent and manager of the appellants. We have here proof of a strange and palpable violation of Reynolds Bros'. order to the appellants to deliver the cargo to their order.

This suit was resisted on several grounds by the appellants.

The first objection to the respondents' demand was that, so far as the appellants were concerned, they were not bound by, nor did assume, any of the obligations of the original bill of lading, except to receive the cargo and notify Crane & Baird. This pretension, as before remarked, I consider to be entirely unfounded. They knew the terms and tenor of the original bill of lading—they took a copy of it for their own use and guidance; they acted upon it, they knew the wheat was to be delivered by them to the order of Reynolds Bros., and they were furthermore aware that the proper and legal order for delivery was Reynolds Bros.' indorsement on the back of the bill of lading. The idea of two separate orders each for the delivery of the whole of the same cargo is simply

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preposterous: and in any and every event they were bound to comply with this direction in the bill of lading, and in conveying the cargo to Montreal, and also in delivering it to Crane & Baird, without any further agreement of informal character, they were, at least, bound to do so with the order of Reynolds Bros. before them and the bill of lading in their possession; and in so obviously and so flagrantly disregarding this essential formality, and by leaving the original bill of lading in circulation as a means of deception and fraud, as in this case, they are justly liable to the respondents' demand by their action, they being the holders of the original bill of lading, *bonâ fide* and for value. The fact is, no valid delivery of the cargo could be made to Crane & Baird or to any other party without the production of Reynolds Bros.' order, indorsed on the original bill of lading; and in the face of this, it is idle to talk about a new bill of lading or a continuing contract. To hold the reverse, would to my mind, not be justified by the facts proved and be contrary, not only to the custom of trade in matters of this kind, but also to the law which should govern this case. A certain amount of unfavorable comment has been made upon the insufficiency of the evidence respecting the usage and custom of trade which respondents sought to establish; and, no doubt, this point is one of considerable importance in this case. But, it will be observed that the testimony adduced had reference more particularly to a certain course of dealing between parties situated as these were; and also to a certain local and necessary usage—and so far, I do not see that the respondents' evidence has been decidedly contradicted. It is not, however, on this proof alone, nor upon this alleged usage that I rest my opinion; in my judgment, the appellants were guilty of much gross negligence, I will not say fraud, in improperly and illegally delivering the respondents' property to third parties, who under the circumstances had no right to it; and that they are clearly liable to respondents for the value of that property.

The appellants, (defendants in the court below,) further

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pleaded that the respondents knew that the wheat had been delivered before they made the advance to Beddall & Co., at the time the bill of lading was indorsed to them as security for the amount advanced. Of this allegation there is not the slightest proof. It does seem to me unreasonable to suppose that such an absurdity could be proved at all, or that the bank would or could be guilty of a proceeding so preposterous and so damaging to its interests. This pretension I would overrule without hesitation.

It was furthermore pleaded that the transfer of the bill of lading was invalid, because the whole cargo of the "Falmouth" was not included in it—one thousand bushels of that cargo having been deducted from the 16,500 originally shipped.

In some cases, no doubt, a transfer by indorsement of a part of a cargo only might be a good ground for refusing to deliver any part of it.

The only difficulty that under particular circumstances could have occurred, would have been as to the validity of the discharge which the appellants could receive from the respondents, as holders of the bill, under an order for a somewhat smaller quantity than the quantity mentioned in the bill. Upon this point there can be no question, because Crane & Baird, being the parties who made the limited endorsement, remained vested with the 1000 bushels not comprised in that endorsement. And as the appellants delivered the whole of the wheat to Crane & Baird, they require no further discharge, than a discharge for the quantity transferred to the respondents. This discharge the respondents are ready and have offered to give them; that is to say by a surrender of the original bill of lading itself. It cannot be an objection in the mouths of the appellants, that the respondents demand less than the quantity mentioned in the bill of lading, since the respondents are willing to deliver up the bill on receipt of that smaller quantity. No possible liability, therefore, can remain as against the appellants. Moreover, as matter of principle, since they had contracted to deliver

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16,500 bushels of wheat to the order of Reynolds Bros., there is nothing to limit the right of Reynolds Bros., to give such orders as would necessitate the delivery of the grain, in part, to different persons.

And, moreover, the objection is a strange one, coming from appellants, who had previously delivered the very 15,500 bushels of the cargo, a delivery in part, upon a delivery order alone. This pretension seems to me to be entirely without foundation in law.

It was still further pleaded, that as the cargo of the "Falmouth" had all been delivered before the endorsement of the bill of lading by Crane & Baird, that endorsement was a nullity, and gave no right either to Beddall & Co. or to the Bank. This appears to me a strange pretension on the part of the appellants. In a few words it amounts to this;—we had previously to these endorsements on the bill of lading delivered the wheat to Crane & Baird without any legal proof that they were the owners—we had never seen the bill of lading in the possession of Crane & Baird nor the endorsement of Reynolds Brothers thereon, in fact we did not know where it was; and all this we did on a separate delivery order from Crane & Baird, and upon our having adopted this strange proceeding, the bill of lading and all the endorsements on it became null and void—were extinguished. Of course, I do not possess the ingenuity necessary to discuss, not to say, combat, such a pretension; but the plain facts were that the wheat had been illegally, I will not insinuate fraudulently, delivered by the appellants, not on Reynolds Bros'. order, but on Crane & Baird's own order alone, leaving the bill of lading in their hands or in the hands of Beddall & Co. for circulation if they saw fit; and then they set up their own default as a valid reason for not delivering the wheat to Reynolds Bros'. order, because they had previously delivered the wheat on Crane & Baird's delivery order. I cannot see how this gross negligence, not to say more, on the part of the appellants can exonerate them. It was their "oversight," their own fault, and I think they cannot avoid the consequences of it.

Some other points are raised.

1st. As to the wheat being mixed with portions of other cargoes. But if so, whose fault was this? The appellants at Portsmouth mixed the "Falmouth's" cargo with other wheat on board of their own vessel—this they admit themselves, and the proof *aliunde* establishes it. I am at a loss to understand that this kind of negligence—of carelessness, can be urged as a valid ground of defence to this action. It was argued:—

2nd. That Beddall & Co. could transfer no greater rights to the Bank than they themselves possessed; and as they had none—the Bank obtained none by the endorsement and delivery of the bill of lading. Now, I think it will be admitted that the end and intent of the original bill of lading were not completed—that it was unexhausted by the mere delivery of the cargo to the appellants at Kingston—that it was in unrestricted circulation. If Beddall & Co. perpetrated a fraud on the Bank; were the Appellants not to blame in the matter, when they delivered the wheat to them, and allowed them to remain in possession of the bill and to circulate as they chose? If Beddall & Co. had no right to transfer the bill of lading to the Bank did not the appellants (unconsciously perhaps) practically connive and co-operate with the firm to practice this peculiar species of fraud on the Bank? And it seems to me somewhat remarkable that, under the circumstances of this case, the appellants could seriously urge such a defence. Besides on this point the authorities are explicit, the bill of lading represents the property until it has been delivered *in conformity with its terms*, and the bill of lading is not effete, or "spent," until such delivery has been made. The article of the Code expressly provides that "when, by the bill of lading, the delivery of the goods is "to be made to a person named or to his assigns, such "person may transfer his right by endorsement and deli-"very of the bill of lading; and the ownership of the "goods and all rights and liabilities in respect thereof are "held to pass thereby to the endorser." (Art. 2421). According to the principle of this article, and according

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to the rule which has been more than once expressly stated in the jurisprudence, the bill of lading remains in force until its conditions have been complied with. In other words, the bill of lading in question remained in force until the goods had been delivered to Reynolds Bros. Until, therefore, the grain in question was delivered to the respondents, the bill of lading remained in force.

I have examined with great care the cases and the decisions cited, referred to in the appellants' factum. No doubt in most of these instances the law is rightly interpreted and laid down; but the difficulty in all cases of this kind, is the correct application of the general principles therein discussed and invoked. It is obvious that some of the greatest judges who thus deal with varying evidence, and with cases differing from this, were themselves very much perplexed, and frequently have had recourse to *obiter dicta*. In dealing with cases of even maritime bills of lading they manifest great caution, even hesitation, in giving their decisions; they, moreover, deal in broad and pretty well known generalities with which most lawyers are quite familiar. But in applying these doctrines, however just and reasonable, we must carefully bear in mind the special provisions of our law—and we must consider with due attention the particular facts of the cases where the application of these principles is insisted upon. The features of this case are very peculiar, and I have no hesitation in holding that, in my judgment, none of the decisions referred to apply directly or conclusively to the case under consideration.

It was finally argued, and with considerable earnestness by the appellants, that the Bank was guilty of *laches*; with our banking acts before them, and the bill of lading in their hands, they were bound to greater diligence than they appear to have exercised; and to have taken more strict precautions with an old and regular customer of the Bank—the respondents. That they were bound, before closing their transaction with Beddall & Co., by vigilant inquiry to ascertain where the cargo was, and a variety of other particulars in regard to it; such as

when it was to arrive, investigate the state of the barges and ascertain whether the cargo was mixed with other wheat or not. As a matter of fact they did nearly all this, but it appears they had these details from Mr. Beddall, who had the bill of lading in his hand, and handed it to them; but perhaps they may be regarded as guilty of negligence, gross negligence as it is styled, because they relied on the statements of the holder of the bill of lading; to my mind, such a view of this case and of the obligations of the Bank cannot be entertained.

It is, moreover, argued that the Bank should have applied sooner to the appellants, once the bill of lading was transferred to them. They allowed too long a time to elapse—they were guilty of gross negligence in this particular, and thereby they forfeited their claim to the cargo or the value thereof. This is a curious idea. It would appear from the evidence that some time before the cargo arrived in Montreal, according to Beddall's statement to the Bank and the date of its probable arrival, the wheat was half way across the Atlantic, owing to what is described as an "oversight" of the appellants. What would have been the useful result of diligence under these circumstances? Simply an empty formality—and could have no bearing on this case. Besides, I am not aware, that either our law, or the custom of trade in like matters, imposes any such diligence or such obligations on the holder of a bill of lading as security for advances such as were proved to have been made in this instance. The Bank had reason to believe that it was quite safe, and so no doubt it would have been, but for this misconduct, the oversight of the appellants in delivering the cargo as they did and when they did. If holders of bills of lading, as in the present case, are bound to exercise this kind of vigilance; to take all these precautions against the oversights and the delinquencies of public carriers; this kind of business will become in a great degree impossible, and our statutes will remain, in a great measure, a dead letter. I am quite prepared to admit that a little more circumspection and diligence should have been exercised after

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the advances had been made and the bill of lading delivered to the Bank. But the only practical result would have been, that they would have found out somewhat earlier, how completely they had been defrauded by Beddall & Co. and that through the gross negligence of the appellants. For all these reasons I am clearly of opinion that both in law and in equity, the judgment of the Court should be confirmed with costs.

CROSS, J. :—

As appears by the bill of lading produced in this case, Reynolds Bros. shipped from Toledo 16,500 bushels red winter wheat by the schooner Falmouth, L. D. Becker, master, bound for Kingston, Ontario, the cargo to be delivered as per address in the margin as follows: "Order "Reynolds' Bros.; notify Crane & Baird, Montreal, P.Q.; "care St. Lawrence & Chicago Forwarding Co.," implying that, although the voyage of the schooner ended at Kingston, the cargo was intended to be put in charge of the appellants, destined for Montreal, Crane & Baird to be put upon their diligence by notice for any interest they had or might acquire in the cargo.

The Falmouth arrived at Portsmouth, near Kingston, on the 3rd or 4th of September, 1880, where the appellants, accustomed to take charge of similar cargoes for Crane & Baird, received it, and put it on board one of their barges, the Mohawk, together with 4,000 bushels similar wheat transhipped from the schooner Willie Keeler.

The appellants, acting as agents for the owners of the cargo, or whomsoever it might concern, the ordinary carriers for Crane & Baird, paid the lake freight to the master of the Falmouth, taking a receipt, which runs as follows:

KINGSTON, PORTSMOUTH HARBOUR,
6th September, 1880.

"$990. Received from the St. Lawrence and Chicago Forwarding Co., "as agents for the owners of cargo, the sum of $990, being payment in "full of freight on cargo of wheat carried in schooner Falmouth, from "Toledo to Kingston, Portsmouth Harbour, and all other claims to date.
"(Signed), L. D. BECKER."

For their reimbursements they drew upon Crane & Baird for this outlay.

No new bill of lading was issued by the master of the Mohawk, nor by anyone representing that vessel, but Mr. Macfarlane, agent for the appellants, and acting for them at Kingston, signed a memo across the face of the bill of lading of the Falmouth as follows: "Received this cargo, St. L. & C. F. Co., signed J. H. Macfarlane," thus constituting themselves agents or trustees for the owners of the cargo, with the knowledge that the bill of lading made it deliverable to the order of Reynolds Bros., with the indication that Crane & Baird had or were to have, something to do with the cargo as consignees or otherwise. The appellants, apparently from the first, looked upon them as consignees, and that they were carrying the wheat for them, which perhaps was correct, as the Falmouth's bill of lading appears to have been transmitted to them.

The Mohawk left Kingston on the 6th September in company with the barge Alfred, another of appellants' vessels, carrying the balance of the cargo of the Willie Keeler, the Mohawk reaching Montreal on or about the 10th of September, and on that day, at the request of Crane & Baird, there was delivered of her cargo to the steamship Canadian 15,500 bushels, and on the 11th September to the steamship Dalton, for Magor Bros., 1,900 bushels, in all 17,400, or an excess of the Falmouth's cargo to the extent of 900 bushels. This surplus was a portion of the 4,000 bushels which had been discharged into the Mohawk from the schooner Willie Keeler.

The balance of the cargo of the Mohawk, consisting of 3,088 bushels, was delivered to Messrs. Beddall & Co., on an order as follows:—

MONTREAL, 11th September.

"No. 3907.

"ST. LAWRENCE AND CHICAGO TOWAGE CO.

"Please deliver Messrs. Beddall & Co., or bearer, 15,500 "bushels red winter wheat.

"(Signed), CRANE & BAIRD,
"Per W. J. CRAIG."

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	Bushels.
" September 14th, ex Mohawk to steamship Pepina for Beddall & Co	3,088
" September 16th, ex Alfred to steamship Pepina for Beddall & Co	6,455
" September 17th, ex Alfred to steamship Pepina for Beddall & Co	5,524
" September 18th, ex Alfred to barque Sarah for Beddall & Co	429
	15,486

The appellants paid for fourteen bushels, the quantity short on the entire of the cargoes of the Falmouth and Willie Keeler, making the last mentioned delivery amount to net 15,500 bushels.

On the 14th September, Beddall & Co. applied for and obtained from the Molsons Bank an advance of $16,275 on the strength of the bill of lading per schooner Falmouth, which then bore the following endorsement:—

" Reynolds & Co.

" D. Macphie, Esq.

" Deliver to Messrs. Beddall & Co., or order, 15,500 " bushels of the within cargo.

" Signed, CRANE & BAIRD.

" Endorsed, BEDDALL & Co."

The transaction was entered in the special loan book of the bank as follows:—" September 14. Demand Loan, 7 " p. c., $16,275. Bill of lading dated 28th August, 1880, " 16,550 bushels No. 2 red wheat: 15,500 endorsed over " by Crane & Baird. Schooner Falmouth, Toledo, O."

The Molsons Bank, contending that the loan they made never having been repaid, and the wheat pledged to them never having been delivered to them, nor the proceeds thereof paid to them, they are entitled, as the holders of the Falmouth's bill of lading, to call upon the appellants, as the carriers of the wheat, to produce it or to pay them its value. They have accordingly brought their suit to enforce the claim so made by them, in which suit they

allege that, by the custom of trade, the appellants, forwarders of the wheat from Kingston, are held to the same obligations as if they had been signers of the original bill of lading, which they allege has force and effect until the cargo reached its destination at Montreal, and the appellants, as such forwarders, were bound to have demanded and secured the surrender of the Falmouth's bill of lading on delivery being made by them to the holder thereof.

The appellants, on their part, plead and contend that they did not undertake to carry the wheat in question under the bill of lading of the Falmouth, to which they were no party, but undertook to carry both cargoes, that is of the Falmouth and Willie Keeler, from Kingston, for Messrs. Crane & Baird, the consignees of both cargoes, to whom they were duly delivered in the manner already explained; that the attempted endorsement for part of the cargo was invalid, and they had no notice thereof until long after the due delivery of the wheat, and that Molsons Bank was guilty of gross negligence in the matter. That Molsons Bank was aware of the delivery of the wheat and authorized Beddall & Co. to ship it in the manner in which it was done, and substituted for the original bills of lading the shipment to Europe and exchange drawn against them, whereby the Molsons Bank suffered no loss. To which the Molsons Bank replied, that they had bought from a broker the exchange appellants referred to, and paid for it in cash without any knowledge of its being the proceeds of the wheat in question.

The bill of lading, endorsements and orders above referred to are put in proof as well as the deliveries of the wheat, the advance of the bank, and their entry of the loan in their special loan book.

The proof makes it apparent that the two cargoes, that is of the Falmouth and Willie Keeler, transhipped by the appellants into their barges Mohawk and Alfred, were both controlled and disposed of by Crane and Baird as the consignees thereof, and that the cargo of the Willie Keeler was by them substituted to replace the previous delivery they had made of the cargo of the Falmouth, but that the

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Molsons Bank failed to get their quantity or any part of it from any source. Witnesses have also been examined in support of the alleged custom of trade, which imposes the obligations incurred under the first bill of lading upon the carrier, who accepts a cargo carried to an intermediate port to forward it to its final destination by an additional transit, and such ultimate carrier being required to procure the surrender of the original bill of lading, to free himself from responsibility, and have given their opinions affirmatively on these propositions.

An attempt was also made on behalf of the appellants to show that the Molsons Bank got the bills of exchange drawn against the last delivery of wheat which Beddall appears to have claimed was a repayment of the loan, and although it may be supposed his view of the imputation of certain subsequent payments left the advances in question covered, this is not consistent with the statement of the bank manager, Mr. Elliott, who explains that this being a special loan, the money subsequently received applied to other transactions. Mr. Beddall being shortly after the transactions in question suffering from his last illness, and having died soon after, his explanation could not be obtained as part of the evidence; but it appears certain that if the Molsons Bank did not recover the wheat in question, they would fall short of being covered to an amount at least equal to that in dispute in this suit. As a ground of defence, this pretension of the appellants may be discarded as not proved.

Then as regards the grounds on which the liability of the appellants is claimed; such liability if it exists must result from the obligations assumed by them in accepting the cargo at Kingston, and a failure on their part to fulfil these obligations. The first enquiry should be, therefore, as to the extent of these obligations. The usage of trade might be useful in determining the manner and conditions on which cargoes in the like circumstances were forwarded to their destination, but could scarcely alter the established significance of the documents used, or the legal relations of the parties according to the facts of the case, or make

liability depend upon obtaining the surrender of a document if it had exhausted its efficiency and ceased to have any operation.

The appellants, being carriers, accepting a cargo with the knowledge of the conditions and objects for which their predecessor held it, knowing that it had been made deliverable to the order of Reynolds & Co., that its destination was Montreal, and that there Crane & Baird were to be notified, implied that the appellants took upon themselves the duty of delivering to Reynolds or assigns, and that Crane & Baird, for some interest, present or prospective, should be notified. That they, the appellants, were to hold the cargo in trust for these purposes; but it was not thereby implied that they held it under the Falmouth's bill of lading, or that they were subjected to all the conditions thereof, or that they were obliged to obtain its surrender to free themselves from liability. It is true that in a certain sense a carrier is held on his bill of lading until complete delivery of the goods has been made, and Capt. Becker would no doubt be liable under his bill of lading until he showed that he had complied with it by a complete delivery according to its tenor. The cases cited on this point turn upon the necessity of a delivery to a warehouseman in place of merely landing the goods. In this instance the appellants may be said to occupy towards the holder of the Falmouth's bill of lading, or rather towards the owner of the wheat, a similar position to that of a warehouseman who has received the goods from the ship, and should keep them for the owner or holder of the bill of lading, which the appellants contend they have done. They might be liable for fault in delivering to other than the apparent proprietor against a party having a good title and doing diligence to assert it.

Let us now see whether a title to the delivery of the wheat in question ever passed to the respondent. The endorsement by Reynolds & Co. was general, and passed the bill of lading to the bearer. The Molsons Bank got any title they had through Crane & Baird, that firm must consequently have been holders of it, and this accords

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with the assumption of the appellants that Crane & Baird were the consignees of the cargo, which other facts would seem to indicate, although perhaps not conclusively as to the exact time at which the cargo was assigned to them. There is no date to the partial endorsement by Crane & Baird to Beddall & Co., it being in the form of an order addressed not to the appellants but to D. Macphie who, it is true, was at the time agent and manager for the appellants although not so qualified in this order; but as it was only on the 14th September that Beddall presented himself at the Molsons Bank to obtain a loan, the presumption is that Beddall & Co. did not get their title before the 14th, and certainly Molsons Bank could have had no title before that date, but at that date none of the cargo of the Falmouth remained; it had all been delivered into ocean-going vessels, on the order of Crane & Baird at that time in possession as assignees of the Falmouth's bill of lading, and consequently established as the true consignees of the cargo. There was, no doubt, intended to be substituted in place of it the wheat ex Willie Keeler, 900 bushels of which only had been absorbed in the previous deliveries; hence the order addressed to the appellants, dated 11th September, "Please deliver Messrs. Beddall & Co., or bearer, 15,500 bushels," applying to wheat that remained of the cargo of the Willie Keeler, and being doubtless the substituted wheat intended to be transferred to the Molsons Bank in place of the cargo of the Falmouth, and being only for part of the cargo, viz., 15,500 bushels remaining in place of the full cargo of 16,400 bushels, the difference, 900 bushels, having been absorbed in the previous deliveries; consequently, when the loan was granted, no wheat of the cargo of the Falmouth remained, nor could be transferred to the Molsons Bank, and the substituted wheat, according to the pretensions of Beddall and the respondents, was afterwards accounted for to the Molsons Bank, but not as far as the proof goes in such manner as to extinguish the loan in question. The negotiability of bills of lading has never been put upon the exact footing of bills of exchange. If

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the comparison were made, they would be found to have some resemblance to negotiable bills whose date of maturity was uncertain. An overdue bill of exchange has to be taken subject to the equities opposable by the previous holder. This should be peculiarly applicable to a previous holder of a bill of lading. The law which imparts to it a negotiability does not exempt the holder from the exercise of reasonable diligence. An advancer on a bill of lading should exercise reasonable diligence as regards the cargo it purports to represent. With seagoing vessels it is customary to give a general notice through the press, when the ship discharges its liability by placing the goods on the wharf. In the present instance the cargo was overdue when the bank took the bill, and an unreasonable time elapsed before they made enquiry concerning it. Although some vague enquiries seem to have been previously made, it was not until the 19th October that the Bank made a serious demand upon the appellants for the wheat. A custom of trade which would hold the carrier until he procured the surrender of the bill of lading of the previous carrier would not be reasonable.

If even the Bank were regular endorsees of the bill of lading, there is a question as to what interest the endorsement would pass. By Art. 2421 of the Civil Code the holder of a bill of lading to order may transfer his right by endorsement and delivery, and the ownership of the goods, and all rights and liabilities in respect thereof are held to pass thereby to the assignee, subject, however, to the rights of third persons.

The power conferred by the statutes to accept transfers of bills of lading as collateral security for advances, may not be quite so ample. The language used in sec. 46 of the Dominion Act, 34 Vic., cap. 5, still in force, is as follows:—"And such bill of lading, specification or re-"ceipt being so acquired, shall vest in the bank from the "date of the acquisition thereof all the right and title of "the last previous holder thereof." When Beddall endorsed the bill in question to the Molsons Bank he had already

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parted with all his interest in the cargo. Could any title to it pass to the Bank under the circumstances?

There is a further difficulty:—Was the order given by Crane & Baird to Beddall & Co. on the back of the Falmouth's bill of lading an endorsement of it? The order was addressed not to the appellants but to Macphie, without any indication of quality as agent or otherwise, and, therefore, incomplete, even as a delivery order. It was not for the entire cargo but only for a portion thereof. It was, in fact, not an endorsement, but a mere delivery order, therefore of no effect until the holder of the wheat should attorn to the person who was to receive, and consent to hold on his account, or at least be notified to do so. Beddall & Co.'s signature after this order was rather an endorsement of the order than an endorsement of the Falmouth's bill of lading.

The Superior Court, however, took a different view of the case, and held that the Molsons Bank had got a valid transfer of the bill of lading of the Falmouth; that its conditions were obligatory on the appellants, who were liable for the cargo, having failed to procure the surrender of the Falmouth's bill of lading when they parted with the cargo. They consequently condemned the appellants to restore the wheat in question, or pay its value. This Court, for the reasons above given, reverses that judgment and dismisses the action of the Molsons Bank.

DORION, C. J.:—

I concur in the judgment of the majority of the Court. The bill of lading was an obligation to carry the wheat from Toledo to Kingston, and deliver it either to Reynolds or his assigns. The wheat arrived at Kingston, and was delivered there to the Forwarding Company. They were acting for Crane & Baird, who were the holders of the original bill of lading. When the carrier who had signed the bill of lading delivered at Kingston his obligation was fulfilled. But it is said that the Forwarding Company which carries goods from Kingston to Montreal had become liable for the obligations of another company

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which could not be sued upon the bill of lading at all. The bill of lading was at an end when the wheat was delivered at Kingston. No doubt the Forwarding Company had an obligation to fulfill. They were liable to Crane & Baird, and they delivered the wheat to Crane & Baird four or five days before the Molsons Bank ever came into possession of the bill of lading. There is no authority for the pretension that the carrier was bound to take back the bill of lading. The Molsons Bank trusted Beddall, who deceived them. The appellants delivered goods to the rightful owner and their obligation ceased there. Therefore the Bank has no claim against the Forwarding Company, and the judgment of the Court below, which maintained the action of the Bank, is wrong. There is another point: I doubt whether there was a valid transfer of the bill of lading, as only a part of the goods was included in it. However, the decision of the Court does not rest on this point. The ground of the judgment is that the bill of lading had become effete when the goods were delivered at Kingston.

RAMSAY, J.:—

The bank brought an action on a bill of lading transferred to the bank for an advance to the firm of Beddall & Co. The bill of lading is in the following form:—

TOLEDO, O., August 28, 1880.

Shipped in good order and condition by Reynolds Bros., as agents and forwarders, for account and at the risk of whom it may concern, on board the schooner Falmouth: whereof S. D. Becker is master, bound from this port for Kingston, Ontario, the following articles as here marked and described, to be delivered in like good order and condition, as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below (dangers of navigation, fire and collision excepted).

In witness whereof, the said master of said vessel hath affirmed to two (2) bills of lading, of this tenor and date, one of which being accomplished the other to stand void.

16,500 bush. No. 2 red wheat.
Freight to Kingston to be
6 cents per bushel.

(Signed), S. D. BECKER,
Master.

Order Reynolds Bros. Notify Crane & Baird, Montreal, P. Q. Care St.

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Lawrence & Chicago Forwarding Company at Portsmouth Harbour, near Kingston, Lake Ontario.

The declaration then goes on to allege that the meaning and intent of the address on the margin of the bill of lading was, that the wheat should be carried and conveyed to Portsmouth Harbour on board the Falmouth, and then be delivered to the appellants, to be carried and conveyed by them to Montreal, and to be there delivered to the order of Reynolds Bros., and that the said firm of Crane & Baird should be notified of the arrival of the wheat. That, upon the execution of the bills of lading, Becker delivered the original to Reynolds Bros., and retained the copy or duplicate. That Reynolds Bros. endorsed the original bill of lading, and delivered it to Crane & Baird and that Crane & Baird thereupon endorsed it specially by an endorsement addressed to D. MacPhie, the agent of the appellants, by which endorsement they required him to deliver to Messrs. Beddall & Co., 15,500 bushels of the cargo mentioned in the bill of lading, they (Crane & Baird) paying all freight charges. That having so endorsed the bill, Crane & Baird delivered it to Beddall & Co. That, by the custom of trade and of merchants from time immemorial, when grain destined for Montreal is shipped from Western ports like Toledo, on a schooner like the Falmouth, under bills of lading like the one set forth in the declaration, such grain is conveyed on board the schooner to Portsmouth Harbour and is there transhipped from the schooner into other vessels belonging to other carriers by water, to be by them conveyed to Montreal, and to be there delivered in accordance with the terms of the bill of lading, or according to instructions received from the master of the schooner. And that, by such custom, the grain so transhipped is conveyed to Montreal by such other carriers, and delivered there in accordance with the terms of the bill of lading, or instructions received from the master."

It was further alleged that Beddall & Co., being holders of the bill and owners of 15,500 bushels of the wheat, obtained the advance in question to the extent of $16,275 from the bank on the 14th September, 1880.

It seems that the wheat arrived at Portsmouth Harbour on the 8th of September, and was delivered to appellant who put it on board of one of their barges called the Mohawk, and it arrived at Montreal on the 11th of September. The bank made a demand of the wheat on the 19th of September, and they were told it had been already delivered.

The appellants met this action by a demurrer, which seems not to have been pressed to judgment separately from the merits on which, substantially, the whole case was decided. The pretensions of defendants, as well in law as in fact, were that they were never parties to the bill of lading in question, that it was not on the 14th of September a negotiable instrument, that even if it was a negotiable instrument it could not be transferred for a part, that the contract entered into by defendants was not a portion of any convention set out in the bill of lading, but "a separate and non-negotiable agreement entered into with the owners of the cargo in Montreal and written on the copy in the possession of the captain of the schooner Falmouth." They further say that at the same time the Falmouth arrived at Portsmouth, another schooner, the Willie Keeler, also arrived with 16,400 bushels of the same kind of wheat consigned to Crane & Baird, that 4,000 bushels of the Willie Keeler's cargo were put into the Mohawk with the cargo of the Falmouth, the rest of the cargo of the Willie Keeler being transhipped to the barge Alfred, and that the barges Mohawk and Alfred started for Montreal where they arrived on or about the 11th Sept., and then and there 15,500 bushels of the cargo of the Mohawk was, on the order of Crane & Baird, delivered to the steamship Canadian, and 1,000 bushels to the steamship Dalton making the total of the cargo of the Mohawk. It is further alleged that subsequently, to wit, about the 14th day of September aforesaid, Messrs. Crane & Baird endorsed the Falmouth's bill of lading to Messrs. Beddall & Co., in the following terms :—

"D. MacPhie, Esq.,

"Deliver to Messrs. Beddall & Co., or order, 15,500 bushels of the within cargo, we paying all freight and charges.

(Signed), CRANE & BAIRD."

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It is also alleged that when Crane & Baird and Beddall & Co. endorsed the bill of lading to the bank, they knew that the wheat had been delivered. The defendants further allege that on the 14th September the firm of Crane & Baird gave to Beddall & Co., the following order for the same wheat, dated Montreal, 11th September 1880 :—

"No. 3,967.

"St. Lawrence & Chicago Forwarding Co.

"Please deliver Messrs. Beddall & Co., or bearer, fifteen thousand five hundred (15,500) bushels red winter wheat ex barges.

"(Signed,) CRANE & BAIRD.
"Per M. J. Craig."

That in obedience to this order the defendants delivered to Beddall & Co. :

14th September, ex barge Mohawk to ship Pepina, bushels	3,088	
17th September, ex barge Alfred to ship Pepina, bushels	6,445	30-60
18th September, ex barge Alfred, to ship Pepina, bushels	5,524	
Bushels	15,057	30-60
18th September, ex barge Alfred to ship Sarah, bushels	429	
Total bushels	15,486	30-60

That these deliveries were made without the production of any bill of lading whatever, and that plaintiffs were aware that B. & Co., had received this wheat, and had authorized them to ship it to Europe.

It will be seen that there is no material difference between the parties as to the question of fact, and that the decision of the Court must be based on questions of law.

The Banking Act of 1880, 43 Vic. c. 22, s. 7, substitutes certain provisions for sections 45, 46, 47, 48, 49 and 50 of the 43 Vic. cap. 5. The substituted section 46 provides that "the bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favor in the course of its banking business; and the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of

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the acquisition thereof, all the right and title of the previous holder or owner thereof, and under this law it is contended: 1, That the bill of lading was extinct, and was not, therefore, such a security as would give the bank a lien on the goods; 2, subsidiarily, that the goods were delivered under that bill of lading and were not carried on from Kingston to Montreal on that or on any bill of lading; 3, That Beddall & Co. had no right to this wheat on the 14th September, it having been all disposed of under the order of C. & B., therefore Beddall could convey no right to the bank.

The substituted article 45 defines a bill of lading: "The words 'bill of lading' when used herein, shall comprise all receipts for goods, wares or merchandise, accompanied by an obligation to transport the same from the place where they were received to some other place," etc.

Avowedly this action is brought on the bill of lading set out above, and the first question that presents itself is whether it is a receipt for goods accompanied by an obligation to transport the same from a place where they were received to some other place. If not, then it was not one of the documents to which the Banking Act has given the qualities of negotiability referred to. It seems to me that this is another way of saying that the goods having been delivered under the bill of lading it was effete.

At the argument some little confusion was created by comparing the negotiability of warehouse receipts and bills of lading to the negotiability of promissory notes. But there is a vast difference between them. Both pass by endorsement, that is to say, the title passes, but in the case of the promissory note there is nothing but a title, while in the case of the warehouse receipts and the bills of lading there is or ought to be something more—a specific object which is pledged, and evidently that cannot pass unless it exists under the bill, as we said with regard to a warehouse receipt in *Williamson & Rhind.*[1]

Of course the parties to the bill of lading who trans-

[1] 22 L. C. J. 166.

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ferred it to the bank are liable for the production of the goods or to indemnify the bank; but it is impossible to conceive on what principle the appellants, who are not liable on the bill of lading in any way, can be condemned upon it. There may be some special action that might implicate the appellants, but its existence is not even suggested. The action contends they were custodians of the wheat under the bill of lading, which clearly they were not. The majority of the Court is to reverse.

The following was the written judgment in appeal:—

"The Court * * *

"Considering that the respondents have failed to prove the material allegations of their declaration, or that the appellants became parties to, or assumed the same obligations as the master of the schooner Falmouth contained in the bill of lading by him granted for the carriage of the 16,500 bushels of wheat in question in this cause from Toledo to Kingston, or that they, the respondents, had a valid assignment of the said bill of lading, or of any part of the cargo represented thereby, before it had been fulfilled, was exhausted and had become effete; And considering that the appellants have proved that prior to any pretended assignment of the said bill of lading to the respondents, they, the appellants, delivered the said 16,500 bushels of wheat to the order of the said Crane & Baird as the true holders of the said bill of lading and consignees of the said 16,500 bushels of wheat, and entitled to receive the same;

"And considering that in the judgment rendered in this cause by the Superior Court at Montreal, on the 19th November, 1881, there is error:

"The Court of our Lady the Queen, now here, doth reverse, cancel, annul, and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action of the said respondents with costs, as well of this Court as of the said Superior Court.

"(The Hon. Mr. Justice Monk dissenting.)

"And on motion of MM. Girouard & McGibbon, attor-

neys for appellants, the Court doth grant them distraction of costs."

Judgment of S. C. reversed.

Girouard, Wurtele, & McGibbon, for appellant.

N. W. Trenholme, counsel.

Abbott, Tait, & Abbotts, for respondent.

Strachan Bethune, Q.C., counsel.

(J. K.)

Nov. 19, 1884.

Coram DORION, C.J., MONK, RAMSAY, CROSS and BABY, JJ.

HON. G. OUIMET, ES-QUAL.,

(*Plaintiff in the Court below*),

APPELLANT;

AND

ADOLPHE NORMANDIN,

(*Defendant in the Court below*),

RESPONDENT.

School municipality—Action against Secretary-treasurer—Jurisdiction of Superintendent of Education—40 Vict. c. 22, s. 22.

Held, 1. That an action by the Superintendent of Education does not lie under s. 22 of Vict. 40, c. 22, (Q.) against the Secretary-treasurer of a school municipality, after he has rendered his account and the account has been approved at a regular meeting of the rate payers and also by the trustees.

2. That even supposing that the action by the Superintendent in this case could be regarded as an action instituted under sect. 36 of the above mentioned Act and sect. 19 of 41 Vict., c. 6, the action would not lie until after the trustees had been put in default to bring such action, and had refused or neglected to do so.

The appeal was from a judgment of the Superior Court,

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Montreal, (TASCHEREAU, J.), dismissing an action brought by the Superintendent of Education against the secretary-treasurer of a school municipality, for the recovery of the books, records and papers of his office, for the payment of the balance alleged to be due by him, and for penalties.

The following was the judgment appealed from:

"La Cour, etc.....

"Considérant que la présente action est portée par le demandeur, en sa qualité de surintendant de l'Instruction Publique de cette province, en vertu de la section 22 de l'acte de cette province 40 Vict., ch. 22 (amendant la section 127 du chapitre 15 des Statuts Refondus du B. C.), et qu'il réclame par cette action la somme de $157.32 des deniers des syndics de la minorité dissidente de la municipalité scolaire du village St-Jean-Baptiste, dans le comté d'Hochelaga, (lesquels deniers le dit défendeur se serait illégalement appropriés), plus l'amende imposée par la dite loi statutaire;

"Considérant qu'il est en preuve qu'après la résignation du dit défendeur comme Secrétaire-trésorier des syndics de la minorité dissidente, le dit défendeur a rendu aux dits syndics un compte complet et détaillé de ses recettes et dépenses pour les dix années précédant sa résignation, lequel compte fut par eux soumis à des auditeurs et approuvé par ces derniers;

"Considérant que les dits auditeurs firent rapport du dit compte et de leur approbation d'icelui, à une assemblée publique, régulièrement convoquée et tenue de tous les contribuables dissidents de la dite municipalité, le 7 décembre 1878, et que du consentement des dits syndics alors présents, le dit compte et le dit rapport des auditeurs furent alors et là présentés et soumis à la dite assemblée qui les approuva unanimement après explications;

"Considérant que la loi pourvoit à l'approbation des comptes d'un Secrétaire-trésorier d'une municipalité scolaire par et au moyen d'une assemblée publique des contribuables, après approbation des dits comptes par les

syndics (Statuts Refondus du B. C. 15, sect. 61), et que dans l'espèce les syndics ont consenti à la dite approbation faite par les contribuables et y ont participé ;

" Considérant qu'après la dite assemblée, le dit défendeur fit remise aux dits syndics de tous les livres, papiers, comptes et objets quelconques appartenant aux dits syndics et qu'il avait en sa possession comme leur Secrétaire-trésorier, ainsi que de la somme d'argent dont il se trouvait reliquataire par son dit compte, lesquels livres, papiers, comptes, objets et sommes d'argent furent dûment acceptés par les dits syndics ;

" Considérant que le défendeur ayant dûment rendu son dit compte approuvé comme susdit, et ayant fait remise de tout ce qu'il avait entre les mains ainsi que de son dit reliquat de compte, n'était plus passible de la pénalité ou amende imposée par la dite section 22 de l'article 40 Vict., ch. 22, ni sujet à l'action permise par la dite section, mais que les dits syndics ne pouvaient que porter une action contre lui, en vertu de la section 36 du même acte et de la section 19 de l'acte 41 Victoria, ch. 6, en réformation, redressement ou révision de comptes, ou pour contraindre le défendeur au paiement des sommes maintenant réclamées, et que le demandeur ès-qualité ne pouvait lui-même porter la dite action en dernier lieu mentionnée qu'à défaut par les dits syndics de la porter eux-mêmes, après avoir été dûment mis en demeure par le dit demandeur ès-qualité, ce qui n'a jamais été fait ;

" Considérant que la dite action spéciale, étant de droit étroit, ne pouvait être portée par le dit demandeur ès-qualité *de plano*, même sur la réquisition des dits syndics, mais seulement à leur défaut de la porter eux-mêmes après mise en demeure légale et formelle, et qu'en supposant même que la présente action serait celle permise par la dite section 36 de l'acte 40 Vict., ch. 22, et par la dite section 19 de l'acte 41 Vict., ch. 6, elle ne saurait être maintenu ;

" Considérant que les dits syndics ou les dits contribuables avaient en outre à leur disposition le recours prévu par la section 16 de l'acte 41 Vict., chapitre 6, s'il

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voulait s'en prévaloir, et que dans l'espèce le dit demandeur ès-qualité avait juridiction pour rendre lui-même jugement en la matière, si on l'en eût requis;

"Considérant en outre que le défendeur a établi par la preuve, que son dit compte était fidèle, légal et régulier, et qu'il ne s'est pas approprié illégalement les sommes d'argent mentionnées en la déclaration, mais que les dites sommes lui étaient légalement dues par les dits syndics et devaient être portées à son crédit dans le dit compte;

"Maintient les défenses, et renvoie la présente action avec dépens, distraits à Messieurs Bonin, Archambault & Archambault, procureurs du défendeur."

H. Abbott for the appellant.

H. Archambault for the respondent.

RAMSAY, J.:—

This is an action by the Superintendent of Education, under 40 Vic. c. 22, sect. 22, amending the C. S. L. C., c. 15, sect. 127, demanding from the former Secretary-Treasurer of the dissident school municipality of St. Jean Baptiste Village, a certain sum of $137.33, being items overcharged or omitted to be charged in his accounts, and also $20 a day from the 11th day of June, 1879, when the notice required by the Statute was given to the defendant, until the payment of these various sums of money.

The defendant pleaded, first, that he had fully accounted, that his accounts had been audited by persons authorized to audit the accounts, that his accounts had been received and accepted at a public meeting of the ratepayers, and that he had paid to the auditors the balance in cash, and that he had delivered all the books and papers to the President and the Secretary-Treasurer. He pleaded, secondly, that having rendered his account and having paid over the balance no action lay at the suit of the plaintiff, who had no right even to question the accounts, except on the demand of five ratepayers in writing—that no such demand had ever been made in writing, and even if it had it did not entitle the plaintiff to bring this action, but that he should have revised them

himself. He pleaded, thirdly, that plaintiff could not bring this action in his own name without having summoned the Trustees to bring the action.

He pleaded, fourthly, insufficiency of notice.

In a fifth plea the respondent explains the items charged, and says that they were fully admitted by the trustees and ratepayers, and that he owes nothing.

The appellant denies that the auditors were properly nominated, that the trustees never accepted or approved the report, that the auditors were deceived by defendant, and that they had no authority to give a receipt.

The second plea is denied generally.

To the third plea it is answered that it was unnecessary to put the trustees *en demeure*, for the trustees had endeavoured to compel the defendant to pay, that notice to trustees is only required where there is collusion between the secretary-treasurer and the trustees, and that in this case the suit was brought at the instigation of the trustees. This answer defines the important question on this appeal.

The fourth plea is generally denied as is also the fifth.

The first question is whether this action lies. It is founded on a Statute passed in 1876, but in 1878 there is an amendment to the Consolidated Statutes providing for the revision of the accounts of the secretary-treasurer on a demand of five ratepayers. It is evident that if the present action lies, this amendment of 1878 is valueless. But there is an amendment to the section of the law of 1876 on which this action is brought which seems to give an explanation of the Statute, and to limit its generality. The amendment is made as an addition to the 36th sect. of 40 Vic, c. 22, and its object is to declare that the superintendent may sue in his own name any secretary-treasurer in office, or who has ceased to be in office, *for any sum of money he may owe arising from school rates, monthly payments or other scholar dues* during his tenure of office, if the commissioners fail to do it after being put *en demeure*. 41 Vic. c. 6, sect. 19.

The action, therefore, only lies if the commissioners

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won't act after being summoned so to do, and for the recovery of certain kinds of indebtedness. This enactment renders the Act of the 40 Vic. reasonable. In this case the trustees did not fail to move after being put *en demeure*, so the action as regards the $22.32 received from Bridgman is premature, and it is altogether unfounded as regards the other items as they are matters of simple administration with which the superintendent had nothing to do, and which seem to have been acquiesced in by the trustees. We are therefore to confirm.

Judgment confirmed.

Abbott, Tait & Abbotts, for Appellant.

Archambault & Archambault, for Respondent.

(J. K.)

Dec. 9, 1884.

Coram DORION, C.J., MONK, RAMSAY, TESSIER & CROSS, JJ.

SENÉCAL,
(*Deft. below*),
APPELLANT;

AND

HATTON,
(*Plff. below*),
RESPONDENT.

Detention of Bonds—Condemnation in event of failure to deliver.

Upon the facts of the case the Court was of opinion (confirming the judgment of the Court below) that the defendant (appellant) was bound to return certain railway bonds which had been placed in his hands by the plaintiff's assignor.

Held, reforming the judgment of the Court below (6 L. N. 220), that the condemnation against the defendant, in default of returning the bonds, should be to pay the actual value thereof, as established in evidence, and not the par or nominal value.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), maintaining the respondent's

action. See 6 Leg. News, 220, where the judgment of the Superior Court is reported in full.

It was an action by which the respondent, plaintiff in the court below, as transferree of Ashley Hibbard, claimed from the appellant thirty-five bonds issued by the Montreal, Chambly and Sorel Railway Company, now called the Montreal, Portland and Boston Railway Company. The bonds are of the par value of $1,000 each, payable twenty years after date of issue, and the action claimed the bonds, together with all interest coupons thereto attached, and the plaintiff prayed that in the event of the appellant failing to deliver over the bonds and coupons within a delay to be fixed by the court, he be condemned to pay to the plaintiff the par value of bonds and coupons, with interest on the latter from the date of maturity.

The circumstances of the case are as follows:—In 1872, the railway company above mentioned, in consideration of the cancellation of a contract then existing between the company and the appellant, Senécal, agreed to pay the latter 25 per cent. of all bonuses and subsidies which the company should receive from the provincial government of Quebec and from municipalities. In 1875 Senécal transferred all his rights to subsidies to Ashley Hibbard, in consideration of the delivery to him by Hibbard of 35 bonds of the company, bearing date 2nd January, 1874. These bonds formed part of an issue of $901,000. Subsequently, in November, 1877, Senécal repudiated the transfer to Hibbard, and transferred his rights to one Hurteau, who collected from the government 25 per cent. of the subsidy granted to the railway company, the percentage amounting to $20,742. Notwithstanding the repudiation by Senécal of the transfer to Hibbard, Senécal retained the 35 bonds which he had received from Hibbard, and the object of the suit was to compel Senécal to return the bonds or pay their par value.

The defence admitted the transfer made in 1875 by Senécal to Hibbard, but it was alleged that Senécal took the bonds with the understanding that Hibbard would pay them or would exchange them for other bonds in the

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course of the month; that in 1876, in pursuance of an arrangement between Senécal and Hibbard, it was agreed that Senécal should retain the bonds for advances he had made to Hibbard; that in case he sold the bonds he was to account to Hibbard, and set off the proceeds against what was due to him by the latter. Senécal alleged that he had a right to retain the bonds so long as they were not sold, and he added that they had not been sold. Subsequently he amended his plea, and alleged that 20 of the bonds had been sold by him to the Hon. Bradley Barlow for 10 cents on the dollar, and that Hibbard was indebted to him in a sum exceeding any amount for which Senécal was bound to account, and that the claim of Hibbard was compensated.

The court below held that Senécal was bound to return the bonds, or to pay their par value, and it was from this judgment that the present appeal was brought.

Hon. A. Lacoste, Q.C., for the appellant:—

The appellant contends firstly, that Senécal had a right to compensate the 20 bonds sold to Barlow (for which he received in all $2,000) by the sum of $2,658, which is due to Senécal by Hibbard. As to the other 15 bonds, it is contended that he has a right to retain them until they are sold. Secondly, if the court should come to the conclusion that Senécal is bound to give up the bonds, it is contended that Senécal, in default of delivery, is liable only for their market value, which is only 10 cents on the dollar, that is, $3,500, against which he is entitled to set off his own claim of $2,658. Thirdly, if Senécal's account be rejected, the condemnation against him should not exceed $3,500, the actual value of the bonds.

Strachan Bethune, Q.C., and *C. A. Geoffrion, Q.C.*, for the respondent:—

It is submitted, in the first place, that it is perfectly apparent that Senécal, after receiving the subsidy, had no right to retain the bonds. He obtained the bonds from Hibbard in consideration of making over to Hibbard his right to 25 per cent. of the subsidy, yet he, Senécal, sub-

sequently repudiated this transfer and treated the subsidy as being still his property, and actually received it through his assignee Hurteau. His alleged account against Hibbard which he offers in compensation has not been proved. Part of the account consists of *bons* which are not stamped, and which, moreover, are prescribed, and other portions consist of judgments against Hibbard, bought by Senécal subsequently to the transfer by Hibbard to Hatton, or under transfers *sous seing privé*, not bearing any date. Moreover, the appellant has failed to prove the alleged agreement by which he claims to have a right to hold the bonds against the indebtedness of Hibbard to him until he should sell them and account for the proceeds. Senécal was in bad faith in concealing the fact that he had sold the bonds. The correspondence shows clearly that the intention was that if Senécal obtained the subsidy he was to return the bonds, or if he disposed of the bonds Hibbard was to have the subsidy; but the appellant has not only collected the subsidy, but has retained the bonds. As to the value of the bonds, evidence has been adduced showing that they were worth much more than ten cents. Some were sold by Mr. Angus and Mr. Goff at 80 cents, and Mr. Brais stated that he expected to get par for eight bonds held by the Hochelaga Bank. The judgment condemning the appellant to pay the par value was correct. He has the option to return the bonds, and if the bonds are worth only ten cents as he pretends, so much the better for him, because he can buy them at that rate and satisfy the judgment by handing back the bonds.

DORION, C.J.:—

The action is by the respondent, plaintiff in the court below, to recover from the present appellant, Senécal, 35 bonds of the Montreal, Chambly and Sorel railway company, of the par value of $1,000 each. The facts which gave rise to this action are somewhat complicated. Senécal is in possession of these 35 bonds, in consideration of a transfer from him to Hibbard of his rights to part of a subsidy which the railway was entitled to get from the

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provincial government. Senécal, however, received the subsidy from the government. It would appear from the facts that Hibbard's claim would rather be for the subsidy than for the bonds. However, he has chosen to ask for the bonds, and when Hibbard's assignee claims the bonds, Senécal does not pretend that he is not entitled to them, but says that he has sold some of them, and that they were worth only ten cents on the dollar. Hibbard transferred his rights to Hatton, the present respondent, who sued to recover the bonds or their par value. Senécal pleaded that he had claims against Hibbard which he was entitled to compensate; further, that he had sold the bonds. The court below set aside all the pleas, holding that the claims against Hibbard were prescribed, and ordered Senécal within 15 days to deliver over the 35 bonds or pay the face value. We think the court below erred in that part of the judgment. Senécal was bound to deliver the bonds, but he was not bound as the alternative to pay the nominal value. What he was bound to do was to pay the market value at the time the bonds were acquired by him. This is the doctrine of all the authors who have written upon failure to fulfil obligations. The court reforms the judgment, and declares that Senécal shall deliver the bonds within a month, and in default pay 25 cents on the par value, equal to $8,750. It is proved that some of the bonds were sold at 10 cents on the dollar, and it is evident that their value at most was 25 cents. The judgment will be reformed accordingly. Senécal will be ordered to give up the bonds within a month, and in default of doing so, he will have to pay $8,750, with interest, and the costs of the court below; costs in appeal against the respondent. As the court below reserved to Senécal his recourse for the pretended claims against Hibbard, the judgment here will not interfere with that part of the judgment below.

RAMSAY, J.:—

Two actions were instituted in the court below, one by the respondent Hatton against Senécal the appellant, the other by Senécal against the respondent Hibbard. The

actions were united because of the connexity of the subject matter, on the motion of Senécal. In both actions the appellant was unsuccessful.

Hatton's action was brought as the *cessionnaire* of Hibbard for the recovery of 35 debentures of the Montreal, Chambly and Sorel Railway Company, now the Montreal, Portland and Boston Railway Company, of $1,000 each, and their coupons with interest at 6 per cent.

It seems that Senécal had rights under a contract of 17th October, 1872, that is to say, he was to have by the above deed 25 per cent. of all subsidies granted by the municipalities or the Government to the railway, to construct the railway in question. Hibbard, who subsequently had a contract, to disinterest Senécal, gave him these debentures in exchange for all his rights under said deed, and he got from Senécal a receipt in the following terms :—

> Received, Montreal, 15th May, 1875, from Ashley Hibbard, thirty-five debentures of the Montreal, Chambly and Sorel Railway Co., of one thousand dollars each, being Nos. 0754 to Nos. 0788, which is in payment in full of my claim against the Montreal, Chambly and Sorel Railway Co., as contained in notarial agreements before John G. Crebassa, bearing date the 17th day of Oct., 1872.
>
> (Signed) L. A. SENECAL.

On the 19th of May Senécal then gave to Hibbard a letter addressed to the Secretary-Treasurer of the Railway Company, authorizing and desiring him to pay to Hibbard all that was to come to him under the agreement.

It seems subsequently to this (22nd November, 1877) Senécal made over all his rights under the contract to Hurteau, and this deed of transfer was signified to the Railway Company, and Hurteau sued the Company and obtained judgment for $20,419.38 in virtue of the deed of the 17th October, 1872. All this would be very clear, if nothing further had taken place, but it appears that the contract, which is evidenced by the receipt and the letter to the railroad company, was profoundly modified, but to what extent and in what manner the parties are not perfectly agreed. That there was a change is admitted on all hands. Hibbard says that he did not give back the

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receipt and the letter to Senécal, but that their papers were in common and that he consented to his getting the Government subsidy; furthermore, in a letter dated the 19th October, 1877, signed by Hibbard and addressed to Senécal, we find this deliberate statement: "I returned you the receipt of the 15th May and the order of the 19th May, 1875." It is, therefore, unnecessary to higgle over the main facts. Now, what is the presumption of these indisputable facts? I think clearly that Senécal had at one time or another the right to deal both with the 25 per cent. of the subsidy and with the thirty-five debentures, and after some hesitation he admits that he did deal with both. It is equally evident, I think, that he had to account for one or other, and this is precisely the pretention of the action, and plaintiff claims the debentures or their face value. The substantial answer to this is: I have sold or pledged the debentures and I cannot give you them, and as regards their value this is one of many transactions, the balance of which is largely in my favour, more than the value of the thirty-five debentures which are only worth $2,000. I am not sure that this defence is not demurrable; but be this as it may that question does arise here. Senécal made a cross demand and the two suits were united, and the whole matter disposed of by one judgment by which the action of Senécal *v.* Hibbard was dismissed with costs, and a reservation of certain rights to Senécal, and the action of Hatton *v.* Senécal was maintained in its entirety. The *dispositive* is as follows:—

"Considering that plaintiff hath proved that the said Ashley Hibbard transferred to him his claim in principal and interest on said bonds by transfer *sous seing privé*, dated 26 January, 1882, then duly signified to defendant L. A. Senécal, doth condemn the said defendant L. A. Senécal to deliver over to the said plaintiff within 15 days from this date the said 35 bonds with all interest coupons, as delivered to the said defendant, and on his default of so doing within the said delay, the Court doth condemn defendant to pay and satisfy to the plaintiff the sum of $35,000, with interest thereon from the 2nd Jan-

uary, 1874, date of the said bonds, together with interest on the amount of each coupon from the date when the same became due and exigible respectively, to wit, on the sum of $1,050 being the aggregate amount of 35 coupons due every half year, on the 2nd day of July and January, in each and every year respectively, commencing on the 2nd day of July, 1874, until paid, and costs of suit distraits," etc.

The portion of the judgment which dismisses appellant's action, appears to me to be perfectly well founded. The action sets up in great measure a transaction which is not proved, and which, I may add, seems to me to be an impossible one. The evidence very inconclusively refers to other sums of money which evidently were not the consideration for the 35 debentures. We are, therefore, left in face of the simple question of the equivalent for the failure to give 35 debentures. It seems to me that the Court below has wrongly determined this question, and that the right of respondent on his own showing is to have 35 debentures or their value—their greatest value —which seems to me to be 25 cents in the dollar. This would amount to $8,750, with interest. I am, therefore, to reverse so far.

MONK, J. :—

The Court has had some difficulty in determining what order should be made as to the coupons. It has come to the conclusion to allow interest on the sum fixed as the value of the bonds, the interest representing the coupons.

CROSS, J. :—

I concur in the view which has been taken of this case by the learned judges who have just spoken ; but as to the value of the bonds, I would be in favor of allowing a higher value, in default of their surrender. I would do so on the principle that Senécal was bound to produce the bonds or give the highest price they were shown to be worth, and I think there is some evidence that would support a valuation of 75 cents. I do not, however, enter a dissent, as I concur in the principle of the judgment of this Court.

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The following is the text of the judgment :—

"The Court, etc.....

"Considering that the evidence of record establishes that the appellant, Louis A. Senécal, received from Ashley Hibbard, one of the respondents, the 35 bonds of the Montreal, Chambly and Sorel Railway Company at the par value of $1,000 each, bearing the numbers (0454,0455, etc., to 0488) dated 2nd January, 1874, and the coupons attached to said bonds at six per cent per annum from their date;

"Considering that it is proved by the admissions of the appellant contained in his plea and amended plea, and by other evidence in the cause, that the said appellant is bound to return the said bonds or to account for the same to the said Ashley Hibbard or his assigns;

"And considering that the said Ashley Hibbard has transferred to the said John Cassie Hatton his claim in principal and interest on said bonds by a *sous seing privé* transfer of the 27th January, 1882, duly signified to the said appellant;

"Considering that the said appellant has failed to prove the allegations of his pleas, and that he is bound by law to return to the respondent Hatton as *cessionnaire* of the said Ashley Hibbard the said 35 bonds, and in default of doing so, to pay the value thereof;

"And considering that it is proved in the cause that the said bonds were at the time the appellant got the same, of the value of 25 per cent. of the face or nominal value of the said bonds;

"And considering that there is error in the judgment rendered by the Superior Court at Montreal on the 9th day of July, 1883, in condemning the said appellant to return the said bonds and in default to do so to pay the par value thereof;

"This Court doth reform the said judgment and doth condemn the said appellant to return to the said John Cassie Hatton, within 30 days from the service upon him of a copy of this judgment, the 35 bonds bearing the numbers 0454, [0455, 0456, etc.,] and 0488, and all coupons

which were attached to the same, and in default of returning the said 35 bonds and coupons to the said John Cassie Hatton within the said delay, doth condemn the said appellant to pay to the said John Cassie Hatton the sum of $8,750, with interest on this last sum from the 2nd of January, 1874, date of the said bonds until paid, and further condemns the said appellant to pay to the said John Cassie Hatton the costs incurred in the Court below *distraits* to Messrs. Hatton & Nicolls, and doth condemn the said John Cassie Hatton to pay to the said appellant L. A. Senécal the costs incurred on the present appeal;

"And this Court adjudging on the merits of the action No. 161 instituted by the said appellant L. A. Senécal, against the said respondent Ashley Hibbard;

"Considering that the said appellant hath failed to establish that he was entitled to the conclusions of his declaration against the said Ashley Hibbard, doth confirm the judgment rendered by the Court below, and doth dismiss the said action of the said Louis A. Senécal with costs against him, both in the Court below and on the present appeal, reserving, however, to the said Louis A. Senécal any recourse which he may have or pretend against said Ashley Hibbard as defendant in the two causes No. 2226 in the Superior Court at Montreal, *Gill & The Montreal, Portland & Boston Railway Company*, and No. 1771 of the Superior Court, Richelieu, *The Merchants Bank of Canada* v. *The Montreal, Portland & Boston Railway Company, Ashley Hibbard* and *L. A. Senécal*."

Judgment reformed.

Lacoste, Globensky, Bisaillon & Brosseau, attorneys for the appellant.

Hatton & Nicolls, attorneys for the respondent.

Robertson, Ritchie & Fleet, attorneys for Hibbard.

(J. K.)

January 28, 1885.

Coram DORION, C.J., RAMSAY, J., TESSIER J., CROSS, J., BABY, J.

THE NORTH BRITISH & MERCANTILE FIRE & LIFE INSURANCE CO.

(*Defendant in Court below*),

APPELLANT;

AND

LAMBE ES-QUALITÉ,

(*Plaintiff in Court below*),

RESPONDENT.

[AND EIGHT OTHER CASES.]

Powers of the Provincial Legislatures—45 *Vict.* (Q.), *ch.* 22—*Direct and Indirect Taxation*—*B. N. A. Act*, 1867, *sect.* 92, *s.s.* 2, 16—*Matters of a merely local or private nature in the Province.*

By the Act 45 Vict. (Q.) ch. 22, "to provide for the exigencies of the "public service" of the Province of Quebec, a tax was imposed on every bank, insurance company, and other commercial corporation doing business in the Province. The tax was imposed in proportion to the paid-up capital of the banks, together with a tax on each office, etc. Some of the corporations interested in the cases here determined have their principal offices out of the Province, and some were incorporated in England or in the United States. In some cases the stock is held chiefly by persons not resident in the Province of Quebec.

HELD:—By the majority of the Court (RAMSAY, TESSIER, BABY, JJ.), confirming the judgment of the Superior Court, M. L. R., 1 S. C. 32:—

1. That the taxes imposed on corporations by the Act in question are personal and direct taxes within the Province, and such as are authorized by sect. 92, sub-sect. 2 of the B. N. A. Act, 1867. A corporation doing business in the Province is subject to taxation under Sect. 92, sub. sect. 2, though all the shareholders are domiciled out of the Province.

2. That even assuming that the taxes in question should be considered as not falling within the denomination of direct taxes, the local legislature had power to impose the same, inasmuch as they were matters of a merely local or private nature in the Province, within the meaning of the B. N. A. Act, Sect. 92, sub. sect. 16.

By DORION, C. J., and CROSS, J.:—That the taxes in question are indirect taxes, and are not authorized by sub. sect. 16 of Sect. 92 of the B. N. A. Act, 1867.

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The N. B. & M. Fire & Life Ins. Co. & Lambe.

The appeal was from a judgment of the Superior Court, Montreal, JETTÉ, J., reported in M. L. R., 1 S. C. 32. Eight other appeals (1), in which the same questions were involved, were argued at the same time, and the judgment applied to all nine cases. The questions at issue are fully disclosed in the opinions of the learned Judges.

Church, Q. C., *Girouard*, Q. C., and *Lacoste*, Q. C., for the License Inspector Lambe.

Laflamme, Q. C., for the Bank of Toronto; *Kerr*, Q. C., for the North British and Mercantile Fire & Life Insurance Co. and for the Export Lumber Co.; *Tait*, Q. C., for the Ontario Bank, Molsons Bank, and Merchants Bank; *Maclaren*, Q. C., for the Canadian Bank of Commerce; *Archibald* for the Williams Manufacturing Co. The argument was commenced on the 21st Nov. 1884, and was continued on the 22nd, 24th and 25th November, 1884.

DORION, C. J. (dissenting):—

Nine cases have been submitted to us in order to test the legality of taxes imposed by an Act passed by the Legislature of the Province of Quebec, in the 45th year of Her Majesty's reign, under ch. 22, and entitled "*An "Act to impose certain direct taxes on certain commercial cor-"porations.*"

The first section of this Act which imposes the taxes claimed by these several actions, is in the following terms:—

1. "In order to provide for the exigencies of the public "service of this Province, every Bank carrying on the "business of Banking in this Province, every Insurance "Company accepting risks and transacting the business "of insurance in this Province, every incorporated com-"pany carrying on any labor, trade or business in this "Province, every incorporated Loan Company making "loans in this Province, every incorporated Navigation

(1) Lambe & Canadian Bank of Commerce; Lambe & Bank of Toronto; Lambe & Ontario Bank; Lambe & Merchants Bank; Lambe & Molsons Bank; The Williams Manufacturing Co. & Lambe; The Ogdensburg Towing Co. & Lambe; The Export Lumber Co. & Lambe.

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" Company running a regular line of steamers, steam-
" boats or other vessels in the waters of this Province;
" every Telegraph Company working a telegraph line or
" part of a telegraph line in this Province; every Tele-
" phone Company working a telephone line in this Pro-
" vince; every City Passenger Railway or Tramway
" Company working a line of railway or tramway in this
" Province, shall annually pay the several taxes men-
" tioned and specified in section three of this Act, which
" taxes are hereby imposed upon each of such commer-
" cial corporations respectively."

Section 3 says, the annual taxes imposed upon and payable by the commercial corporations mentioned in section 1 shall be, on Banks * * * $1,000 when the paid-up capital is from $500,000 to $1,000,000, and an additional sum of $200 for each million or fraction of a million dollars of the paid-up capital from one million to three million dollars, and a further additional sum of $100 for each million or fraction of a million dollars of the paid-up capital over three million dollars, and an additional tax of $100 upon each office in the cities of Montreal and Quebec, and $20 for each office in any other place.

By the subsequent provisions of this Act, these taxes are payable annually, and the recovery can be made on behalf of Her Majesty, and by section 10 these taxes are to form part of the consolidated revenue of the Province.

Of the nine cases under consideration, which have all been instituted by the Revenue Inspector for the District of Montreal, five are against Banks, and the others against an Insurance Company, a Manufacturing Company, a Railway and Navigation Company, and the ninth against a Navigation Company. Of these, six were incorporated either by the Dominion Parliament or before the passing of the British North America Act, 1867; one was incorporated in England, and two in the United States. Three have their principal offices in the Province of Quebec, and the others have their principal offices out of the Province, but they are all doing business in the Province of Quebec. The stock in three of the com-

panies is held by parties residing out of the Province, and in the others by parties a portion of whom reside in the Province, while the other portion reside out of the Province.

In the five Bank cases the actions have been dismissed by Mr. Justice Rainville, and in the four others they have been maintained by Mr. Justice Jetté and Mr. Justice Mathieu.

These nine cases form part of a larger number of cases now pending against other corporations for the recovery of similar taxes, and have been represented at the hearing as indicating the different classes into which the whole of the cases may be divided according to the special circumstances of each case.

I may at once say that I do not find that these special circumstances are such as to take any of the cases out of the rule which I think is applicable to all of them.

The question, and the only question, to be decided, as stated in the admissions given in several of these cases, is, whether or not the Provincial Legislature had authority to pass the Act 45th Vict., c. 22, and to impose the taxes sought to be recovered.

Mr. Justice Rainville, relying principally on arguments drawn from the decisions rendered in the United States, has ruled in the five Bank cases, that the present tax was not a direct tax within the meaning of the *British North America Act*, 1867, that the Provincial Legislature had no authority to impose such a tax, and as a consequence he has dismissed the five actions.

Mr. Justice Jetté and Mr. Justice Mathieu, rejecting the authority of American decisions, as inapplicable to the present cases, inasmuch as the words "*direct taxes*" in the American constitution are controlled and limited in their application by the obligation imposed upon Congress to apportion such "*direct taxes*" in proportion to the census, and relying principally on the opinions expressed by French writers on political economy, have come to an opposite conclusion and declared that the legislature in imposing the present tax had acted within the limits of its authority.

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Now, without rejecting altogether the assistance which may be derived from a careful examination of the decisions rendered on this question of direct taxation by the eminent jurists who, sitting in the Supreme Court of the United States, have had to give an interpretation to those words, as found in the Constitution of their country, nor the valuable opinions expressed by political economists as to the meaning of those words, I do not think that either of those standards is a satisfactory one in the present cases. It cannot be denied that the words "direct taxes," in the Constitution of the United States, cannot apply to some of the taxes which are elsewhere considered as direct taxes, and that they were therefore used in a limited sense in the Constitution of the United States.

Chief Justice Chase, in the case of *Veazie Bank* v. *Fenno* (8 Wallace, 533,) after a careful review of the judicial decisions and of the opinions of jurists and others, came to the following conclusions :—

"It may be rightly affirmed, therefore, that in the prac-
"tical construction of the Constitution by Congress,
"direct taxes have been limited to taxes on *land* and
"appurtenances, and taxes on polls or capitation taxes."

And the same learned judge further says :—

"It may be safely assumed, therefore, as the unanimous
"judgment of the Court, that a tax on carriages is not a
"direct tax. And it may further be taken as established
"upon the testimony of Paterson, that the words 'direct
"taxes,' as used in the Constitution, comprehended only
"capitation taxes and taxes on land, and perhaps taxes
"on personal property by general valuation and assess-
"ment of the various descriptions possessed within the
"several States." (8 Wallace, p. 546.)

Judge Cooley, on Taxation, p. 5, note 2, also says :—

"The term 'direct taxation' is employed in a peculiar
"sense in the Constitution, in the provision requiring
"such taxes to be apportioned according to representa-
"tion, and they are, perhaps, limited to capitation and
"land taxes;" and Kent, vol. 1, p. 255, says: "The Con-

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" stitution contemplated no taxes as direct taxes, but " such as Congress could lay in proportion to the Census."

On the other hand, there is a great diversity of opinion among jurists and writers on political economy, not only as to what taxes are to be considered as direct taxes, but even as to the definition of what constitutes a direct tax.

Merlin, Répertoire, vo. Contributions Publiques, sec. 1, says: " *Les contributions indirectes sont suivant la définition* " *qu'en donne la loi, en forme d'instruction, du* 8 *janvier* 1790, " *tous les impôts assis sur la fabrication, la vente, le transport et* " *l'introduction de plusieurs objets de commerce et de consom-* " *mation, impôts dont le produit ordinairement avancé par le* " *fabriquant, le marchand, ou le voiturier est supporté et indirecte-* " *ment payé par le consommateur.*"

" D'après cette définition les droits d'enregistrement (the droits d'enregistrement include and are chiefly composed of the duties levied on the conveyance of real estate whether by inheritance or otherwise) " ne devraient pas " être considérés comme des impositions indirectes, cepen- " dant *on s'est habitué à les ranger dans cette classe.*"

" C'est aussi à cette classe qu'appartiennent les droits " de douane, les droits sur le tabac, sur les cartes à jouer, " sur le sel, sur les boissons, etc."

Say, Traité d'Economie Politique, p. 521, has the following passage:—" On peut ranger sous deux chefs princi- " paux les différents manières qu'on emploie pour atteindre les revenus des contribuables. Ou bien on leur " demande directement une portion du revenu qu'on leur " suppose: c'est l'objet des contributions directes; ou " bien on leur fait payer une somme quelconque sur cer- " taines consommations qu'ils font avec leur revenu: " c'est l'objet de ce que l'on nomme en France les con- " tributions indirectes."

This writer places among the direct taxes, " *la contri-* " *bution foncière, la contribution mobilière et les patentes,*" and among the contributions indirectes, " les droits de douane, " l'octroi, les billets de spectacles, le timbre des journaux, " les droits sur la vente du tabac, le transport des lettres " par la poste, le timbre," etc., and he says: " Toutes ces

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" manières de lever les contributions les rangent dans la " classe des contributions indirectes, parce que la demande " n'en est pas faite à personne directement, mais au pro- " duit, à la marchandise frappée de l'impôt," and in a note, he adds: "Et non parcequ'elles atteignent indirec- " tement le contribuable ; *car si elles tiraient leur dénomina- " tion de cette dernière circonstance, il faudrait donner le même " nom à des contributions très directes, comme par exemple à " l'impôt des patentes* qui tombe en partie indirectement sur " le consommateur des produits dont s'occupe la patente."

" La patente, says de Gerando, Droit Administratif, vol. 4, p. 42, " confère le droit d'exercer librement une " branche d'industrie." (*Loi des* 2-17 *mars* 1791.)

At p. 129, the same writer says: "La licence a quel- " qu'analogie avec la patente, elle s'applique à la pro- " fession exercée."

" Elle correspond à la déclaration de celui qui l'exerce; " elle la constate.

" La déclaration a pour objet de faire connaître à l'admi- " nistration ceux qui exercent une profession spéciale- " ment soumise à la surveillance.

" Elle est exigée des débitants de boissons, des mar- " chands en gros, des brasseurs, distillateurs et bouilleurs " de profession."

This writer places the *droits de patentes* among the *contributions directes* and the *droits de licences* among the *contributions indirectes*. (pp. 5 and 42 and pp. 100 and 129.)

Leroy-Beaulieu, Traité de la Science des Finances, vol. 1, p. 214, after showing that the definition of direct and indirect taxes is not the same in every country, says:

" Par l'*impôt direct* le législateur se propose d'atteindre " immédiatement du premier bond et proportionnellement " à sa fortune ou à ses revenus, le véritable contribuable; " il supprime tout intermédiaire entre lui et le fisc, et il " cherche une proportionalité rigoureuse de l'impôt à la " fortune ou aux facultés.

" Par *l'impôt indirect* le législateur ne vise pas immédia- " tement le véritable contribuable et ne cherche pas à lui " imposer une charge strictement proportionnelle à ses

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" facultés : il ne se propose d'atteindre le vrai contribua-
" ble que par ricochet, par contre-coup, par répercussion :
" il met des intermédiaires entre lui et le fisc, et renonce
" à une stricte proportionnalité de l'impôt dans les cas
" particuliers, se contentant d'une proportionnalité rela-
" tive en général."

Passy, in the Dictionnaire de l'Economie Politique, vo. impôt, says :

" C'est un usage reçu de diviser les impôts en deux ca-
" tégories distinctes. On appelle *directs* ceux que les
" contribuables acquittent eux-mêmes pour leur propre
" compte ; on appelle *indirects* ceux dont certains d'entre
" eux ne font que l'avance et dont ils obtiennent le rem-
" boursement des mains d'autres personnes."

The test applied by these two writers to distinguish direct from indirect taxes is inconsistent with the definition given by Say. It is, however, substantially the same as that indicated by Merlin as derived from the law of the 8th of January, 1790, and by Mill, *Principles of Political Economy, lib.* 5, ch. 8, § 1, who says :—

"Taxes are either *direct* or *indirect*. A *direct tax* is one
" which is demanded from the very persons who *it is*
" *intended or desired* should pay it. *Indirect taxes* are those
" which are demanded from one person in the expecta-
" tion and intention that he shall indemnify himself at
" the expense of another : such are the *excise* or *customs*."

And Walker—*Science of Wealth*, p. 338 :—

" A *direct tax* is demanded of the person who it is
" intended shall pay it. *Indirect taxes* are demanded from
" one person, in the expectation that he will indemnify
" himself at the expense of others."

According to McCulloch, *Principles of Taxation*, p. 1 :—

" A tax may be either direct or indirect. It is said to
" be direct when taken directly from property or income,
" and indirect when it is taken from them by making
" individuals pay for liberty to use certain articles or to
" exercise certain privileges."

Under this last definition the revenue raised by means of the licenses mentioned in sub-sect. 9 of sect. 92, of the

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Confederation Act, would in England be considered as the out-come of an indirect tax, while in France it might be considered as a patent tax, which is a direct tax, or a license tax, which is an indirect tax.

Mill, in the work already cited, ch. 5, § 1, says:—

"Besides direct taxes on income, and taxes on consumption, the financial systems of most countries comprise a variety of miscellaneous imposts not strictly included in either class."

I do not wish to discuss here the comparative merits of these definitions and classifications. My only object in making the above citations is to show that the expressions "*direct*" and "*indirect taxes*," in their legislative application, are purely conventional terms; having a different meaning according to the different legislation of each country in which they are used, and that as legal terms they have no common or scientific basis.

This could hardly be otherwise, since in every country new taxes or new modes of taxation, unknown in other countries, are constantly brought into operation, and old or effete taxes are revived under new names and a new classification, so that it is almost impossible for foreign writers to follow the changes.

The old *aides* or *gabelles* which existed in France before the Revolution, and were abolished by the *Assemblée Constituante*, became under the First Empire the "*droits réunis*." The "*droits réunis*" disappeared with the Empire; the taxes, however, were retained at the Restoration, under the less obnoxious name of *contributions indirectes*.

In England, some of the stamp duties, and even some of the taxes formerly known as assessed taxes, have by recent statutes been declared to be excise duties.

Stephen, *Commentaries*, vol. 2, p. 567, speaking of excise, says that, in England, "its advantages, indeed, are such "that under recent Acts of Parliament many imposts "have been classed (probably for greater convenience in "collection) under this head of duties, which are not "properly in the nature of excise. Such is the case with "regard to licenses, which the law requires to be annu-

"ally taken out by those who manufacture or deal in "certain articles, or who follow certain employments."

This is very much the same language used by Merlin as regards the *droits d'enregistrement*, when he says they ought not to be considered as *impositions indirectes, cependant on s'est habitué à les ranger dans cette classe.* If such a change can be done by usage or custom, surely it can be effected by express legislation.

In the case of *Springer* v. *The United States* (102 United States Rep., p. 597,) the following passage of a brief prepared for the case of *Hylton* v. *The United States*, by Hamilton, the distinguished statesman and jurist, is cited:—

"What is the distinction between *direct* and *indirect* "*taxes*? It is a matter of regret that terms so uncertain "and vague, on a point so important, are to be found in "the Constitution. We shall seek in vain for any antece- "dent settled legal meaning to the respective terms. "There is none. We shall be as much at a loss to find "any disposition of either which can satisfactorily deter- "mine the point."

And in the case of *Veazie Bank* v. *Fenno* (8 Wallace, 533), to which I have already referred, Chief Justice Chase is reported to have said: "Much diversity of opinion has "always prevailed upon the question what are direct "taxes? Attempts to answer it by reference to the defini- "tions of political economists have been frequently made, "but without satisfactory results. The enumeration of "the different kinds of taxes which Congress was author- "ised to impose was probably made with little reference "to their speculations."

All this shows the difficulty of applying in every country, the same test of description to the words *direct or indirect taxes*; and I think that the remarks of Chief Justice Chase are as applicable to the British N. America Act as to the constitution of the United States. We must therefore look elsewhere for a satisfactory interpretation of the legal meaning of the words *direct taxation* as used in the British North America Act. We must first exhaust

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the ordinary rules of interpretation applicable to statute law, and seek in the Act itself and in the different provisions relating to the power of taxation what meaning the Imperial Parliament has attached to those words. We must also refer to the other acts passed by Parliament on the same or cognate subjects, to find how similar taxes have been classified, and finally we must consider what effect the decisions already rendered by our highest courts and by the Lords of the Privy Council on the several questions of taxation, which have come before them, have on the present cases. Should these enquiries fail to satisfy us, then we may have recourse to those more remote and I may add less satisfactory sources of information, the United States decisions and the opinions of political economists, not as authority, but as arguments and reasons emanating from eminent jurists and scientific men, whose views on such questions are, undoubtedly, deserving of great consideration.

By referring to the British North America Act, we find that the third sub-section of section 91, gives to the Dominion Parliament the exclusive legislative authority for the raising of money by any mode or system of taxation. Section 102 provides that all duties and revenues over which the respective legislatures of the several provinces, at the time of the Union, had power to appropriate, except such as are reserved to the respective legislatures, or are raised by them in accordance with the special powers conferred on them by the Act, shall form one consolidated revenue fund to be appropriated for the public service of Canada, &c.

By sec. 121, all articles of the growth, produce or manufacture of any of the Provinces are to be admitted free into the other Provinces.

Section 122 places the customs and excise laws in force in each Province under the control of the Dominion Parliament, by providing, that "*The customs and excise laws of each Province are to remain in force until altered by the Parliament of Canada.*"

By section 123 Interprovincial customs duties are abo-

lished, and section 124 reserves to the Province of New Brunswick the right to levy certain existing export duties on lumber, but forbids their increase ; and finally, it is provided by section 126, that those portions of duties and revenues reserved to the respective governments or legislatures of the Provinces, and *the duties raised by them in accordance with the special powers conferred upon them by the Act, shall in each Province form the consolidated revenue fund of the Province.*

From these several provisions it is clear that the whole of the duties and revenue of which, before the Union, each of the provinces could dispose, including *customs and excise duties*, have been transferred to the Dominion, together with the exclusive power to alter them and to raise money by any mode or system of taxation ; except as regards such portions of those duties and revenues which are reserved to the Provinces, and such other duties *as they may raise under the special powers conferred on them.*

The Provinces have therefore no power to deal with or to impose customs or excise duties, nor to raise any revenue whatsoever by taxation unless the power and authority to do so has been specially conferred upon them by some other portion of the Act, and only to the extent to which such power has been conferred.

Now, there are only two provisions of the Act, by which the provincial legislatures are authorised to raise a revenue by taxation. They are contained in sub-section 2, and sub-section 9, of section 92, and they are in these terms :—

Sub-sec. 2. "*Direct taxation within the Province in order to* "*the raising of a revenue for provincial purposes.*"

Sub-sect. 9. "*Shop, saloon, tavern, auctioneer and other* "*licenses in order to the raising of a revenue for provincial, local* "*or municipal purposes.*"

These two sub-sections are mere exceptions to the exclusive power of taxation conferred on the Dominion Parliament by section 91, sub-sect. 3, and must be read

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in connection with this last sub-section, as if it was in the following terms, viz. :

" It shall be lawful for the Queen, by and with the " advice and consent of the Senate and House of Commons, " to make laws for the peace, order and good Government " of Canada, in relation to all matters not coming within " the classes of subjects by this Act assigned exclusively " to the legislatures of the Provinces ; and for greater " certainty, but not so as to restrict the generality of the " foregoing terms of this section, it is hereby declared that " (notwithstanding anything in this Act), the exclusive " legislative authority of the Parliament of Canada extends " (3). To the raising of money by any mode or system of " taxation, with the exception that each Provincial Legis- " lature may exclusively make laws in relation to direct " taxation within the Province, in order to the raising of " a revenue for provincial purposes, and (9) in relation to " shop, saloon, tavern, auctioneer and other licenses in " order to the raising of a revenue for provincial, local or " municipal purposes."

There is no authority here conferred on the provincial legislatures to raise a revenue by indirect taxation, nor by customs or excise duties, except in so far as shop, saloon, tavern, auctioneer and other licenses, may be considered as excise duties, all others being excluded by the exclusive power of taxation conferred on the Dominion Parliament by sub-sect. 3, of section 91, and by sections 102, 121, 122, 123, 124 and 126 already mentioned.

This is made very clear by the resolutions which were submitted to the Legislature of the Province of Canada as the basis of the Confederation Act. Resolution 29 (Debates on Confederation, p. 3), proposed that : *The General Parliament shall have power to make laws for the peace, welfare, &c.*, and especially laws respecting :

3rd. *The imposition or regulation of duties of Customs or Imports and Exports, except on Exports of Timber, &c., from New Brunswick and of Coal and other minerals from Nova Scotia.*

4th. *The imposition and regulation of Excise Duties.*

5th. *The raising of money by all or any other modes or systems of Taxation.*

In the Confederation Act, the articles 3 and 4 of the 29th resolution were dropped, except as to export duties on lumber in New Brunswick and on coal in Nova Scotia, which were provided for in another form by sections 109 and 124 of the Act, and article 5, which became sub-section 3 of the 91st section, was modified by striking out the words "*all or any other modes or systems of taxation,*" and substituting therefor the words "*by any mode or system of taxation,*" so as to include the duties of customs and of excise mentioned in the third and fourth articles; and to avoid doubts as to the respective powers of the Dominion Parliament and of the Provincial Legislatures, the word "*exclusively*" was added in the first part of section 91, so as to give to the Dominion Parliament the exclusive power to legislate on customs and excise duties, as well as on the other subjects mentioned in this section. Then the other sections already cited, namely, 102 and 126, specially provide that the local governments shall have no other sources of revenue except those expressly reserved, and those which they are authorized to raise in accordance with the special powers conferred upon them by the Act; so that, apart from the exclusive authority given to the Dominion Parliament to raise a revenue by all modes of taxation, we have the repeated declarations contained in sections 102 and 126, that the provinces shall have no right to impose any duties or taxes except under the special powers given to them by the Act.

I find no difficulty in reconciling the exclusive power given to the Dominion with the exclusive power attributed to the Provincial Legislatures as regards taxation. The Dominion Parliament has the exclusive power to raise a revenue by all modes of taxation for Dominion purposes, and the Provincial Legislatures have exclusive authority to raise a revenue by direct taxation for Provincial purposes. That is, the Dominion alone, to the exclusion of the Provincial Legislatures, is authorized to raise a revenue for Dominion or general purposes, and

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the Provincial Legislatures, to the exclusion of the Dominion Parliament, are authorized to raise a revenue by direct taxation for their respective provinces. In other words, the Dominion Parliament cannot interfere with the taxation for provincial purposes, nor the local legislatures with the taxation for Dominion purposes.

It has been contended that, as by sub-section 16 of section 92 the local legislatures were authorized to legislate on all matters of a purely local or private nature in the provinces, they were therefore authorized to raise a revenue for provincial purposes by all modes of taxation, including direct and indirect, as well as by customs and excise duties. The answer to this contention is obvious.

One of the most elementary rules of interpretation of Statutes is that general provisions in an Act of Parliament do not control nor affect the special enactments which it contains, and therefore the general authority conferred by sub-section 16 as to matters of a purely local or private nature in the province can only apply to such other matters as are not specially provided for by the Act, and as the subject of provincial taxation is specially provided for by sub-sections 2 and 9 of section 92, sub-section 16 does not apply to the subject of taxation. (Dwarris, p. 765.)

If sub-section 16 was not limited by the preceding sub-sections 2 and 9, these sub-sections would have been quite unnecessary, since sub-section 16, by the generality of its terms, would have covered all subjects over which the Provincial Legislatures could have exercised their legislative authority.

The historical evidence derived from the discussions which took place in the parliament of Canada on the confederation resolutions show that it was never intended that the local legislatures should have the unlimited power to impose all kinds of taxes.

Sir Alexander Galt, then Finance Minister, in explaining the financial aspect of the proposed confederation, said: (Parliamentary Debates on Confederation, p. 58) "If nevertheless the local revenues become inadequate, it

"it will be necessary for the local governments to have "recourse to *direct taxation*, and I do not hesitate to say "that one of the wisest provisions in the proposed con- "stitution, and that which affords the surest guarantee "that the people will take a healthy interest in their own "affairs and see that no extravagance is committed by "those placed in power over them, is to be found in the "fact that those who are called upon to administer public "affairs will feel when they resort to direct taxation, "that a solemn responsibility rests upon them, and that "that responsibility will be exacted by the people in the "most peremptory manner. If the men in power find "that they are required, by means of *direct taxation*, to pro- "cure the funds necessary to administer the local affairs, "for which abundant provision is made in the scheme, "they will pause before they enter upon any career of "extravagance. Indeed I do not hesitate to say, that if the "public men of those provinces were sufficiently educated "to understand their own interests in the true light of the "principles of political economy, it would be found better "now to substitute *direct taxation* for some of the indirect "modes by which taxation has been imposed upon the "industry of the people. I do not however believe that "at this moment it is possible, nor do I think the people "of this country would support any government in adopt- "ing this measure, unless it were forced upon them by "the pressure of an overwhelming necessity."

And further, (p. 69,) Mr. Galt added:

"In transferring to the general government all the "large sources of revenue and in placing in their hands, "with a single exception, that of *direct taxation*, all the "means whereby the industry of the people may be made "to contribute to the wants of the state, etc."

The tax Mr. Galt was speaking of and which he thought *could only be forced on the people by the pressure of an overwhelming necessity*, was neither a customs nor an excise duty, both of which the people of Canada had long been accustomed to pay, but the direct tax which is assessed by the tax gatherer going to every house and

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exacting either a capitation tax, or a proportion of each inhabitant's income or property to replenish the provincial treasury. These were the only direct taxes known in the provinces, in some of which they were raised for municipal and partially for school purposes. When Mr. Galt gave this solemn warning to the public men who would be charged under confederation with the management of the provincial affairs and spoke of this dreaded direct tax, he did not contemplate, that to convert it into the most popular tax ever imposed, it would only be necessary for the provincial legislatures to pass an act, with the title: "An Act to raise a revenue for provincial purposes by "means of a direct tax within the Province," and to enact that every British, Foreign or domestic Insurance Corporation, every Bank, every Loan Company, every Navigation and Telegraph Company, whether incorporated in Canada or elsewhere, whether their stock was held in the province or not, but doing business in the province, should pay a tax calculated not on the amount of business done in the province, but on the paid up capital or stock of each company, so as to indirectly collect the greater portion of this tax through the English, the American and other capitalists investing their money in any of the commercial enterprises mentioned in the act.

As however the Legislatures of the Provinces cannot extend their power of taxation by declaring that a tax is a direct tax, if it is not so under the British North America Act, we have to examine the question raised in the present cases irrespective of the description or name given by the 45th Vict., ch. 22, to the tax imposed by its provisions.

It is not contended that the present tax was imposed under the authority of sub-section nine, for it is not a tax raised by means of licenses, and it is evident that the legislature intended to *impose certain direct taxes*, since it has used those very words in the title of the Act,—yet it is necessary to ascertain what is the character of the duties which the Provinces are authorised to raise by means of the licenses mentioned in sub-section nine, in order to collect the meaning which the Legislature of the late Province

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of Canada and the Imperial Parliament have attached to the words " direct taxation " as used in the resolutions passed by that legislature and in the B. N. A. Act.

It seems evident that neither the Legislature of Canada, nor the Imperial Parliament did consider that the revenues to be raised by these licenses were " direct taxes," otherwise sub-section nine would have had no meaning, since " direct taxation " was already provided for by subsection 2.

Now, let us see how these license duties and other similar duties were considered in England before and at the time the British North America Act was passed. As far back as 1808, the Imperial Parliament passed an Act (43 Geo. III., ch. 69) to repeal duties of *excise*, and to impose others to replace them. The first item of the new duties mentioned in Schedule A., under the title "*Duties of Excise*," is a duty of sixpence on sales by auction of certain property to the amount of twenty shillings, and the second item is of another duty of tenpence on similar sales of other classes of property. Then the same schedule headed "duties of excise" contains a description of persons who are obliged to take licenses in order to exercise certain trades or businesses, and among them are to be found, besides those for manufacturing or selling beer, ale or spirits of any kind, *every person exercising the trade* or business of *auctioneer*, every person trading or vending or selling *coffee*, *tea*, *cocoanut*, every person trading in, vending or selling *gold or silver plate*, every dealer or seller of *tobacco* or *snuff*, for which licenses they have to pay a license fee varying in amount according to the kind or amount of business done.

The necessities of state during the great continental wars of the first quarter of the present century required constant changes in those licenses and duties, and there are several statutes in which they are described as excise licenses and excise duties.

In course of time, new taxes were imposed, and among others a tax on Railway Companies, which is charged on the number of passengers carried. No license is required

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in this case. The tax is, however, placed in the list of excise duties.

In 1864, three years before the passing of the British North America Act, the Imperial Parliament passed the 27th and 28th Vict., ch. 56, by which it is enacted that from and after the first day of July, 1864, the duties now payable by law upon or in respect of the licenses to be taken out in the United Kingdom "by persons carrying "on the trades and business hereinafter mentioned as de- "scribed and defined by statutes relating to such licenses "and trades or business respectively, that is to say:— "Appraisers; pawnbrokers; dealers in gold and silver "plate; owners, proprietors, makers and compounders "of and persons uttering, vending or exposing for sale "any medicine liable to a stamp duty; hawkers and "pedlars; house agents; sellers of playing cards not "being makers thereof, shall respectively be denomi- "nated and deemed to be duties of excise, and the said "licenses respectively shall be granted by such officer or "officers of Excise."

Again, if we look at the returns made to Parliament of the different sources of revenue for the fiscal year ended on the 31st of March, 1866, the year before the Act of Confederation was passed, we find the last-mentioned duties classed among the duties collected from excise, as also the railway tax, the stage carriage tax, licenses and duties on retailers of spirits, on tea and coffee dealers, on auctioneers, and on many other classes of persons carrying on particular trades or business.

It may be true, as observed by Stephen, loc. cit., that some of these imposts are not properly in the nature of excise duties, if these words are used in the limited sense of duties on consumption; but it is not the technical classification which political economists might make of these different imposts we have to ascertain: it is the legal meaning which the Imperial Parliament has attached to the duties which the Provincial Legislatures are authorized to impose by means of shop, tavern, auctioneer and other licences mentioned in sub-section 9,

and this we find clearly indicated in the several statutes which have been passed since the beginning of the present century to regulate excise duties, and in the public documents submitted to and sanctioned by the Imperial Parliament. If these license duties in their origin were not strictly excise duties in the technical sense of those words, they are so intimately connected with them, as accessories to the raising of excise duties, that they have long since been considered as part and portion of them; and if, as Merlin tells us, the *droits d'enregistrement* in France are generally considered as indirect taxes, although they are not properly so, there is far greater reason in construing an Imperial statute to consider as excise duties what the Imperial Parliament has repeatedly declared to be so.

The licenses mentioned in sub-section 9 of the British North America Act are the same as some of those mentioned in the statutes and returns we have just referred to; and in the absence of any expressions to distinguish them from the same imposts levied in England, we must hold that they are of the same character, and that by enacting the 9th sub-section of section 92, Parliament clearly indicated their intention of authorizing the Provincial Legislatures to impose by means of licenses imposts which were different from and not included in the authority given by sub-section 2 to raise a revenue by direct taxation.

The next inquiry is as to whether the present taxes are of the same nature as those mentioned in sub-section 9.

It seems to be indifferent how a business tax is levied in England. It is sometimes by a license fee, as in the case of shop and tavern keepers, hawkers and pedlars, &c.; sometimes partly by a license fee and partly by a percentage on the business, as in the case of auctioneers. In the case of railways, no licenses are issued, and the tax is on the number of passengers carried, that is, on the gross business of the companies, or it is on the number of miles run irrespective of the business done, as in the case of stage carriages, and sometimes on the kind of

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carriage, the number of seats they have, or the number of horses attached, that is, on the capacity to do business irrespective of its amount, and yet the nature of the tax is not changed by these differences, and in all these cases the impost is considered as an excise duty.

Cooley, on Taxation, pp. 20-21, says:—

"TAXES ON EMPLOYMENTS.—A tax on the privilege of "carrying on a business or employment will commonly "be imposed in the form of an *excise tax* on the license to "pursue the employment; and this may be a specific sum "or a sum whose amount is regulated by the business "done, or income, or profits earned. Sometimes small "license fees are required, mainly for the purpose of "regulation, but in other cases substantial taxes are "demanded because the persons upon whom they are "laid would otherwise escape taxation in the main, if not "entirely. Instances of hawkers, pedlars, auctioneers, "&c., will readily occur to the mind. The form of a "a license, though not necessary, is a convenient form for "such a tax to assume, because it then becomes a condi-"tion to entering the business or employment, and is "collected without difficulty. But it is equally compe-"tent to impose and collect the tax by usual methods."

Mr. Justice Manning in the case of *Childers* v. *People* (11 Michigan, pp. 43-49), says:—"Taxes upon business "are usually collected in the form of license fees; and "this may possibly have led to the idea which seems to "prevail in some quarters that a tax implies a license. "But there is no necessary connection between them. A "business may be licensed and yet not taxed, or it may "be taxed and yet not licensed."

This shows that the character of a tax is not altered by the fact that it is collected by means of a license fee or without a license.

In the present instance the tax imposed was mentioned as a license or a license tax in the bill when first introduced into the Legislature. During the progress of the measure the title of the Bill was changed into that of an Act to impose certain *Direct Taxes* on certain commercial

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corporations. It cannot be reasonably contended that the nature of the tax was thereby altered. The name alone was changed, but not the substance.

It is also evident, that there can be no difference whether the tax is imposed on individuals, companies or corporations. We have just seen that in England an Excise duty was imposed on Railway Corporations, as well as on the owners of Stage Carriages and Hackney Coaches.

In the United States, where the State Legislatures are endowed with general powers to legislate on all subjects not specially delegated to Congress representing the Federal legislative authority, and where the several States are authorised to raise a revenue by means of *Excise Duties*, the question as to the nature of a tax on the business carried on by Corporations has repeatedly been adjudicated upon and its proper classification determined.

In the case of the *Attorney-General* v. *The Bay State Mining Co.* (99 Mass. 148), it was held that the right to exercise a corporate franchise within the State of Massachusetts was the proper subject of an *Excise Tax* which the State had a right to impose. The same thing was decided in the case of *Oliver* v. *The London Fire Insurance Co.* (100 Mass. 538).

In the case of the *Commonwealth* v. *Hamilton Manufacturing Co.*, 12 Allen, 298, Bigelow, C.J., said: "It is too "clear to admit of discussion that according to recent adju- "dications of this Court, the assessment which is the "subject of controversy in these actions must be supported "if sustained at all, as the exercise by the legislature of "the authority conferred by that clause of the constitution, "part 2, c. 1, § 1, art. 4, which gives the power of imposing "duties *and excises* upon any commodity within the "Commonwealth; in other words, it cannot be held valid "unless it can be construed to be in the nature of an ex- "cise tax on the franchise of the corporations designated "in the Statute, &c." . . . And at p. 304, the learned judge adds: "These illustrations serve to show that an "assessment based on the market value of the shares of a "corporation, of the aggregate of said shares, or capital

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" stock, cannot be properly deemed a tax on the property of " the corporation." And again at p. 307, "To our minds, it " is a sufficient and decisive answer to that argument, that, " according to the views we have already expressed, the " assessment in question is an excise duty on the franchise " of the corporation on which it is imposed, and was " intended by the legislature to have that operation and " effect only, and not in any proper sense a tax on corporate " property." See also *Portland Bank* v. *Apthorp*, 12 Mass. 252.

These decisions differ from those rendered by the United States Supreme Court on the interpretation to be given to the words "direct taxes" used in the constitution of the United States, inasmuch as the Supreme Court had to consider how far direct taxation was limited by the necessity of apportionment according to census or population, while in the other cases the naked question was whether a tax on business or on what is described as a tax on the franchise when applied to a corporation was an *excise tax* or not. The affirmative decisions on this point are directly applicable to the present cases, and they show conclusively that in the United States as well as in England a tax on business or employment is considered as an *excise tax*. The effect of a tax on the manufacturer as in the case of the Williams Manufacturing Company, or on the carrier, as in the case of the Lumber Export Company, is just the same as if the tax was imposed on the goods manufactured in the one case or conveyed in the other; in both cases the result is to raise the price of the commodity and to cause the tax to be paid by the consumer, or to reduce the profits of the producer, in which case the latter has to pay the whole or a portion of the duty.

That excise taxes are not direct taxes does not, it seems, admit of controversy, at least at the present time, whatever may have been the discussions on the subject at an early date of their imposition. It is admitted by every writer on political economy, whether English, French or American. And this has not been questioned either at the bar or by any of the judges who have decided the present cases.

If there could be a doubt as to whether the tax imposed by the Quebec Legislature is an indirect tax, there can be none that according to Imperial legislation and American jurisprudence (there seems to be no occasion where such a question can arise in the courts in England), that it is an *excise tax*; and the Provincial Legislatures have no more authority to impose an excise tax than an indirect tax.

If we now turn to the decisions rendered on the taxing powers conferred by the British North America Act, we find that in *Severn & The Queen* (2 Supreme Court Reports, p. 79), all the judges admitted that a license fee of $50 imposed upon a brewer was an *indirect tax*; at p. 94, Richards, C.J., qualified it as an *excise tax*, when he said: "It is not doubted that the Dominion Legislature had the right to lay on this excise tax and to grant this license."

In the case of the *Attorney General* v. *The Queen Insurance Co.*, (3 H. of L. & P. C. 1090) their lordships of the Privy Council held that the tax was not a direct tax and that it was therefore *ultra vires*.

I understand that the same conclusion has been arrived at by their Lordships in the case of the *Attorney-General* v. *Reed*, with reference to the tax recently imposed upon legal proceedings, although I have not yet seen the written judgment in that case.

It was held in those three cases that the Provincial Legislatures had no authority to impose indirect taxes, unless they came within the scope of Sub-Section 9 of Sect. 92, and that the taxes imposed were not direct taxes.

It will be said that in the case of *Black & Dow* the Privy Council stated that there might be other taxes imposed under Sub-Section 16, besides those mentioned in Sub-Sections 2 and 9, but this was entirely outside of the case, since their Lordships were of opinion that the tax claimed was a direct tax and they did not indicate what other taxes could be imposed under Section 16, and therefore it cannot be said to what they alluded by the observation they made. I am, however, free to admit that there may possibly be some taxes which might be imposed for local purposes under Sub-Section 16.

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When we consider that every provision of the B. N. A. Act shows that the object of the promoters of the measure was to place each Province in a state of perfect independence as regards each other, to establish the utmost freedom of intercourse and commercial relations between them, to exclude from the legislative authority of the Provinces all regulations as to trade and commerce, customs and excise, navigation and shipping, banks, bankruptcy and insolvency—in fact every subject which might give occasion to an interference by one Province directly or indirectly which would affect the interests of the other Provinces; it is impossible to suppose that it was intended to allow the several Provinces to raise their revenue by taxes calculated to reach the inhabitants of the other Provinces, their monetary institutions, their telegraphs and insurance companies, and the natural or industrial products of each by duties imposed, not on the products themselves (this is expressly forbidden by the B. N. A. Act), but upon every Railway Company, every Steamship or other Navigation Company, whose ships should be employed to move such products from one Province to another or to a foreign market. Such a pretention is inconsistent with the whole object and intent of the Act, as disclosed by almost every disposition which it contains, and affords a strong argument against the validity of the present tax.

The words "*Direct taxation within the Province*" seem to imply that the taxes to be imposed must be raised from persons residing or property situated within the Province by which they are imposed, and not otherwise; and it is a characteristic feature of direct taxation, that it is only raised from persons residing in the territory where they are imposed or on property therein situated. I do not mention this as decisive, but as an indication of what was meant by "direct taxation" in the British North America Act.

To pretend that the present tax is a direct tax, would be to hold that it is a personal or capitation tax. A capitation tax, as its name indicates, is a general tax imposed

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on each head of a family, or on every male inhabitant in the community. I do not know how this could apply to a corporation, and more particularly when it is imposed on the capital of such corporations, and on the several offices which they have; the effect of which would be that several capitation taxes might be imposed on the same corporation, as is the case with the Merchants Bank, from which five or six taxes are claimed, by reason of the several offices it has in the Province.

Whether this tax is considered from the evident intention of the framers of the British North America Act, as disclosed by its enactments, or from the various dispositions contained in other Acts of the Imperial Parliament as regards similar taxes raised in England, or again from the light to be derived from the decisions of the Supreme Court and of the Privy Council, or from those of the United States, and the general tenor of the definitions given by political economists on the subject of direct and indirect taxation, I cannot arrive at any other conclusion but that the present taxes must be held to be *excise* and *indirect taxes*, which the Provincial Legislatures have no right to impose.

I would confirm the judgments in the five Bank cases, and reverse the judgments in the other four cases. I am, however, in the minority, and the judgments in the Bank cases will be reversed, and the others confirmed.

CROSS, J.:—

The observations which I am about to read were prepared more particularly in the case of *Lambe* v. *The Ontario Bank*, but they are for the most part applicable to all the other cases.

William B. Lambe, License Inspector for the revenue district of Montreal, sues the Ontario Bank as a corporation having its place of business in the city and revenue district of Montreal, claiming $1,200 as a tax upon their banking capital of $1,500,000, and an additional tax of $100 for having an office or place of business in the city of Montreal, said taxes being claimed as imposed and due

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under the Statute of Quebec, 45 Vic., cap. 22, entitled, An act to impose certain direct taxes on certain commercial corporations, and which by sec. 3 declares that the annual taxes imposed upon and payable by the commercial corporations mentioned and specified in section one of this act shall be as follows: 1st. Banks. Five hundred dollars when the paid-up capital of the bank is five hundred thousand dollars or less than that sum; one thousand dollars when the paid-up capital is from five hundred thousand dollars to one million dollars, and an additional sum of two hundred dollars for each million or fraction of a million dollars of the paid-up capital, from one million dollars to three million dollars, and a further additional sum of one hundred dollars for each million or fraction of a million dollars of the paid-up capital over three millions.

To this action the Ontario Bank pleaded to the effect that by section 91 of the British North America Act of 1867, the exclusive legislative authority of the parliament of Canada extended among other things to: 2. The regulation of trade and commerce; 3. The raising of money by any mode or system of taxation; 15. Banking, Incorporation of banks, and the issue of paper money. By section 92 of the same act, in each province, the legislature might exclusively make laws for among other things: 2. Direct taxation within the province, in order to the raising of a revenue for provincial purposes; beyond which no power of taxation was granted to the legislature of any province. The Ontario Bank held its charter under the Dominion statute, 34 Vic., cap. 5, entitled "An act relating to banks and banking, amended by subsequent acts. Their capital of one million five hundred thousand dollars was held and owned by shareholders, whereof two-thirds resided out of the province of Quebec. Their chief place of business was in Toronto, Ontario, where more than two-thirds of their capital was employed, and about a third in the province of Quebec; that under the powers conferred by their charter, they did business and had offices and agencies throughout the Dominion and beyond the Province of Quebec; that the tax in question was not direct

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within the meaning of said 92nd section of the British North America act. It interfered with the regulation of trade and of banking by imposing restrictions thereon; that it affected persons beyond the limits of the Province of Quebec; that it purported to be regulated by the amount of the paid-up capital used and held beyond the limits of the Province; it was unjust, partial and discriminating against one set of persons for the benefit of another set. That by reason of what was so pleaded the Act of the legislature of Quebec, under which said tax purported to be imposed, was illegal, unconstitutional and *ultra vires*.

The demand being based on the provincial statute to which it refers, and there being no dispute about the facts set forth in the plea, an admission was made of the essential statements it contained, and the issues thus raised were submitted upon arguments made by the parties to the Superior Court, which, by its judgment, held that the statute of the Province of Quebec, 45 Vic., c. 22, in so far as it imposed the tax in question, was unconstitutional and *ultra vires*. Hence the present appeal brought by the license inspector.

A preliminary question was raised, that the statute of Quebec invoked was a nullity and had no existence in law, because passed in the name of the Queen in place of the legislature of Quebec. I have not thought it necessary to discuss this point, having no doubt that the statute was formally sanctioned by all the legislative power of the province and so sufficiently appears on the face of it. I think I am warranted in not treating this point as serious.

The main question raised is purely one of law, viz.: Whether the statute of Quebec, 45 Vic. cap. 22, in so far as it imposes the tax in question is within the power of the provincial legislature. The debatable ground as to the relative powers of the Dominion and provincial legislatures has been narrowed by the number of decisions which have been rendered on subjects nearly approaching the one now under discussion. In *Severn* v. *The Queen*,[1] a

[1] 2 Supreme Court (Can.) Rep. 70.

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provincial statute requiring a brewer to take out and pay a sum of money for a license for permission to carry on his business was held to be in conflict with the power of the Dominion parliament to regulate trade, and also that it was an indirect tax. In the case of the *Attorney-General* v. *The Queen Insurance Co.*, [1] it was held that the statute of Quebec, the Quebec License act of 1875, 39 Vic., c. 8, was virtually a stamp act and that the tax thereby imposed was an indirect tax. In the case of the *Citizens Insurance Co.* v. *Parsons*, [2] it was held that the terms, property and civil rights 13thly enumerated in sec. 92 of the British North America act, included rights arising from contracts where not explicitly mentioned as comprised in any of the powers conceded to the Dominion legislature under sec. 91; that for the protection of property and civil rights within the province, a local legislature could impose conditions to contracts of insurance becoming operative within the province. In *Russell* v. *The Queen*, [3] it was determined that the Canada Temperance act of 1878, does not belong to the class of subjects included by the denomination of property and civil rights in the enumeration of powers attributed to the provincial legislatures by sec. 92 of the British North America act. In the *City of Fredericton* v. *The Queen*, [4] it was determined that the Canada Temperance act of 1878 was within the competency of the Dominion legislature, which alone had the power to pass such an act in virtue of their power to regulate trade and commerce. In *Hodge* v. *The Queen*, [5] it was held that the Ontario License Act of 1877, authorizing the adoption of resolutions in the nature of police or municipal regulations or by-laws, fixing the hours for selling liquors and keeping open billiard tables, were of a local character for the good government of taverns, &c., and did not interfere with the general regulation of trade and commerce, and was within the powers of the provincial legislature.

[1] 3 L. R., H. of L. and P. C. cases, p. 1097; 1 L. N. 410.
[2] 7 L. R., H. of L. and P. C. cases, p. 109, 5 L. N. 25.
[3] 7 L. R., H. of L. and P. C. cases, p. 335; 5 L. N. 234.
[4] 3 Supreme Court (Can.) Rep., p. 505.
[5] 9 L. R., H. of L. and P. C. cases, p. 117; 7 L. N. 18.

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These decisions will still leave considerable room for discussion as to the relative powers of the Dominion and Provincial legislatures, and the fixing of an exact line of demarcation between them, which it appears difficult to reach on any general principle, and has consequently in part to be considered in relation to each individual case which seems to present a doubt, and that now under discussion may be fairly reckoned as one of such cases, that is, a case not wholly settled by any previous decision, although its determination is doubtless aided by the principles laid down in the previous decisions. It is, therefore, yet an open question whether the tax in question, imposed in virtue of the statute of Quebec, 45 Vict. cap. 22, purporting to authorize the levy of what it terms direct taxes on the paid-up capital of banks doing business within the province, is *ultra vires*; and whether said statute, in so far as it purports to impose such tax, is unconstitutional. It may be assumed that the power of taxation by an independent sovereign state, is unlimited as regards the persons and property falling within its jurisdiction. The powers we have to consider are derived from a plenary source, and have to be construed as falling within the limits of the grant by which they are conferred. Whether the powers conveyed are in the aggregate plenary, being distributed, that is divided between two authorities, the Dominion and the Provincial, they cannot be plenary to each, but the division has been so contrived as to be in part exclusive to each, and in some particulars it must be conceded common to each. The terms in which these powers are conveyed are of necessity very general for the most part, and although, as regards certain of them, a clear distinction may be obvious, yet there are others which seem to run into and overlap each other, rendering it difficult to obtain a clear line of demarcation.

The powers of the provinces are exceptional, and are enumerated, save as to No. 16, which comprises generally all matters of a merely local or private nature in the province. The powers of the Dominion are general: To make laws for the peace, order and good government of

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Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the provinces, but for certainty, although not to restrict the generality of the powers conceded, an enumerated class of subjects under twenty-nine heads are assigned exclusively to the Dominion, none of which subjects are to be deemed of a local or private nature, as assigned to the provinces under section 92. It follows that the powers of the provinces are restricted to those specially enumerated in section 92 as assigned to them, and are limited by the terms and conditions on which the concession is made. They are further restricted by the exercise of the Dominion enumerated powers specially given by section 91, which may conflict with the enumerated powers of the provinces assigned to them as specified under section 92. Where exclusive powers seem to have been given to both, as in the case of direct taxation, then, with due consideration of the above qualification, the provisions so conflicting must be read together so as to give reasonable effect to both, especially where such seems necessary for the working of the Act.

With the aid of these inferences drawn from the terms of the statute, and making allowance for the ground covered by the decided cases, there is still much room for controversy in the cases that are continually arising in relation to these relative powers. The experience of the United States of America and the judicial decisions rendered there on constitutional questions, are naturally looked to as of value in solving questions arising under our constitution. One consideration of importance to be kept in view in the application of decided cases there, as precedents for us, is that with them each state was considered as originally possessed of sovereign authority over persons and property within its jurisdiction. That in forming their confederation all powers not specially conferred or surrendered to the general government were reserved to the States. The British North America confederation proceeds from an opposite standpoint, on the opposite theory, providing, as in effect it does, that all

powers not expressly conferred on the local or provincial legislatures are attributed to that of the Dominion. The power of the state governments in the United States is relative to the United States government greater than that of the provinces to the Dominion; yet it has been held uniformly by the Supreme Court of the United States, that the general government was possessed of certain implied powers convenient or necessary for carrying on the functions of the government, and that within their sphere the government of the Union was supreme. Cooley on Taxation, at p. 57, No. 3, says the means or agencies provided or selected by the federal government as necessary or convenient for the exercise of its functions, cannot be subject to the taxing power of the states. The states cannot tax a bank chartered by congress as the fiscal agent of the government, in support of which he cites the case so often referred to, of *McCullough* v. *The State of Maryland et al.*[1], where it was held that the state government had no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers. The states had no power, by taxation or otherwise, to retard, impede, hinder, bind, or in any manner control the operation of the constitutional laws enacted by congress to carry into effect the powers vested in the national government. The bank in question in that case was a quasi commercial enterprise owned in great part by private shareholders, yet it was chartered as a United States bank, and was the financial agent of the government. C. J. Marshall, who pronounced the judgment, among other remarks stated in effect, that although no express authority was given by the constitution of the United States, either to create corporations or to establish banks, and although it was conceded that the inherent power of taxation remained with the people of each state to the full extent to which it had not been alienated, although the federal government itself could exercise no powers but those granted to it,

[1] 4 Wheaton Supreme Court Rep., p. 316.

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which were enumerated powers, yet the government of the union, limited as it certainly was, nevertheless was supreme within its sphere; that although among their enumerated powers were not to be found that of establishing a bank or creating a corporation, yet as an attribute of sovereignty it could create corporations, and as a means to carry into effect the objects of the government with which they were entrusted, it could establish banks, and the agencies of those banks throughout the United States were not subject to taxation by the state power; that the act to incorporate the bank of the United States was made in pursuance of the constitution, and was part of the supreme law of the land; that the tax imposed on this bank by the state of Maryland was incompatible and repugnant to the constitutional laws of the Union; that it was a franchise created by the United States congress within their exclusive attribute of powers, and what they had a right to do, the state government had no right to undo; that the power of the United States to create, implied a power to preserve; that a power in the state of Maryland to tax the bank created by the United States, would be a power to destroy, and if wielded by a different hand would be incompatible with the power to create and preserve; that when such repugnance existed the authority which was supreme should control and not yield to that over which it is supreme. He further remarked: If the states could tax one instrument employed by the government in the execution of its powers, they might tax any and every other institution. They might tax the mail; they might tax the mint: they might tax patent rights; they might tax the papers of the custom house; they might tax judicial proceedings; they might tax all the means employed by the government. It was, however, conceded in that case that the denial of the state power to tax did not extend to the real estate of the bank, nor to the interest of the shareholders resident within the state imposing a tax upon their property in shares.

In *Weston* v. *Charleston*,[1] it was held that the State Legislature could not, by taxation or otherwise, retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. In the case of *Osborn* v. *The Bank of the United States*,[2] it was held that a State cannot tax the Bank of the United States, and that any attempt on the part of its agents and officers to enforce the collection of such tax against the property of the bank would be restrained by injunction. In *Brown* v. *The State of Maryland*,[3] C. J. Marshall says: We admit the power to be sacred, the State power to tax its own citizens or their property within its own territory, but we cannot admit that it may be used so as to obstruct the free course of a power given to Congress. In the case of *Railroad Co.* v. *Penniston*,[4] it was held by a majority of the judges that a tax upon a railway company incorporated by Congress to run through several States, imposed by the State on property of the company within the State, was valid, but a tax upon the operations of the company being a direct obstruction to the exercise of federal power could not be allowed; thus making a distinction between a tax on the franchise and a tax upon the property. The minority of the judges were of opinion that the tax even on the property of the company, although within the taxing State, was invalid.

In applying to the present case, the principles that run through these decisions, I think it must be assumed that where, by the British America act, the Dominion Government are given an exclusive power, it stands in the same relation to the power, and is entitled to the same protection from the courts as the power conceded to the Congress of the United States for the exercise of their functions of government. Moreover, we find no instance where an express power given to the Congress of the United States

[1] 2 Peters' Rep., p. 467.
[2] 9 Wheaton, 738.
[3] 12 Wheaton, 448.
[4] 18 Wallace, U. S. R.

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has been, by the sanction of the courts, interfered with by taxation or otherwise by the State power.

If the power of the Dominion Legislature be exclusive for the regulation of trade and commerce, and in the matter of banking and the incorporation of banks, and the power of the Provincial Legislatures limited to direct taxation and the issue of certain classes of licenses, it follows that banks created by the Dominion Legislature, for the purpose of doing business throughout the Dominion, cannot be taxed, retarded, impeded, burdened or in any manner controlled by the operation of any enactments of the Provincial Legislatures. The same should hold good as regards the regulation of trade and commerce, at least as to general trade and commerce of public or general interest to the Dominion.

This is evidently the view adopted on the subject in the United States. Cooley, at p. 162, remarks: When, therefore, it is held that a power to tax is at the discretion of the authority which wields it, a power which may be carried to the extent of an annihilation of that which it taxes, and, therefore, may defeat and nullify any authority which may elsewhere exist for the purpose of protection and preservation, it follows as a corollary that the several States cannot tax the commerce which is regulated under the supremacy of Congress. Burroughs on Taxation, p. 93, sec. 64, Regulation of Commerce. The constitution provides that Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. * * * The doctrine is now firmly established that the taxing power of the States, while it may be exercised upon all property within their limits, upon the goods carried or the instruments of commerce as property, and thus indirectly affect commerce, yet where the tax law amounts to a regulation of commerce it is void, because in conflict with the power granted to Congress, which, when exercised, is exclusive and supreme.

It was admitted in these American cases, as in fact the powers by the constitution reserved to the States, per-

mitted, each of the States the right to create banks and other corporations of their own, and to tax such institutions of their own creation, but the power to tax a United States bank as such,—that is, on its existence or its operations, in other words, its franchise or capacity to do business—was always denied and held to be unconstitutional. If, therefore, a bank of the United States could not be taxed by State power, nor thereby retarded, impeded, hindered, or in any manner controlled, by the same process of reasoning it follows that, in a matter where the Dominion Government has been attributed exclusive authority, the Provincial Government cannot be permitted to render its exercise nugatory by assuming to tax the legitimate operations of that Dominion Government acting within the sphere of its attributes. The same rule should hold good where the tax affects trade and commerce, at least the general trade of the country. The Provincial statute, 45 Vic., cap. 22, now in question, is the renewal, with an extension of the subjects, of the attempt made to raise revenue from insurance companies under the statute of Quebec 39 Vic., c. 7. The proposed exaction being now, by the former of these acts, styled a direct tax; the first attempt proved futile, the tax being held unconstitutional by the decision in the case of the *The Attorney-General* v. *The Queen Insurance Co.* The fact that it is now called a direct tax, will not alter its nature, nor do I think add to its validity.

It seems to me that the tax in question is open to a further objection by the want of territorial jurisdiction in the Quebec Legislature over the subject of taxation. By the terms of enumeration 2 of sec. 92 of the British North America act, "Direct taxation within the Province," the Provincial Legislature is not entitled to exercise its taxing power on objects beyond the territorial limits of the Province. The statute of Quebec 45 Vic., cap. 22, sec. 1, purports to impose the tax on every bank carrying on the business of banking in this Province, and under sec. 3 the rate of tax is scheduled according to the amount of its paid-up capital. The respondent is a bank incorporated by act of

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Parliament, and holds its present charter under the Dominion statute 34 Vic., cap. 5, and amendments. Its head office is at Toronto, in Ontario. Its paid-up capital is located at Toronto, and, so far as being Provincial property, is within the jurisdiction of Ontario. It is true that it is represented in the Province of Quebec by its agents there, and it employs some of its capital in the Province of Quebec. These agents and the capital employed in the Province of Quebec are within its local jurisdiction, and as such may be proper subjects of taxation within its Provincial power, but they are not taxed as such; on the contrary, it is the paid-up capital of the bank, its franchise or capacity to do business, which is attempted to be taxed, and which is not within the jurisdiction of the Province of Quebec.

If the franchise or capital were taxable within the Province of Quebec, it would be much more legitimately taxable in Ontario, and would be equally taxable in each of the Provinces in which the bank might open an agency, so that it might come to be taxed for the necessities of seven several Provincial Governments, as well as liable to a like visitation from the federal power. This, again, would not interfere with direct taxation of its property within the province. In such case, would any or all of these taxes be direct? and if any, which? Now, although duplicate taxation is not impossible, the law generally presumes against it, even within the same jurisdiction; see Cooley on Taxation, p. 105; nor do I think that it would be tolerated, that by coercion of the agency within its limits, a Provincial Government could lay a tax on a franchise or property beyond its limits. A Government with plenary powers might exercise such indirect coercion, but it is altogether inapplicable to the circumstances of the present case. The principle of confederation necessarily implied that one Province would not interfere with the taxable subjects or property of another Province, hence the qualifying words "within the Province" in No. 2 of sec. 92 include this limitation, which would have been implied from the circumstances

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had even this express qualification been omitted. Cooley, at p. 15, says the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property or business. And at p. 14 he says taxation and protection are reciprocal. A personal tax cannot be assessed against a non-resident; neither can the property of a non-resident be taxed unless it has an actual situs within the State. In the case of *Leprohon* v. *The City of Ottawa*,[1] in the Court of Appeals, Ontario, Mr. Justice Paterson says: The restrictions confine such taxation within the Province. I think this has not been questioned. The paid-up capital of a bank is necessarily a very fallacious data for taxation. At the very outset of the business of the bank the capital must of necessity have been diminished by preliminary expenses. If prosperous in business, its assets must come to exceed its paid-up capital; if the reverse, its paid-up capital is an unfair basis of taxation. When the franchise is taxed, it is usually on its estimated value as a facility for doing business. In Burroughs on Taxation, p. 164, he says: The right of the corporation to exist and exercise the powers vested in it by its charter is called its franchise; and at p. 166, § 85, Tax on the Franchise: This tax is in its essential nature the same as the license tax, and the same principle as to the powers of the State to tax applies to domestic corporations when they are first chartered as applies to foreign corporations. Again, at p. 174, § 87, Capital; How Taxed (that is, of corporations): Corporations are sometimes taxed on their nominal capital, and sometimes on its actual value. When taxed on its nominal capital, the tax is on the whole amount paid in or secured to be paid, without reference to losses. The capital is referred to as a measure of the price to be paid for the franchise. In the case of a foreign corporation, the bonus or tax is the amount paid for the privilege of exercising its corporate powers in the State. In the case of a domestic corporation, it is the amount paid as the price of its corporate

[1] Cartwright, p. 635.

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existence. It only exists by the permission of the State, and the State may prescribe the terms on which it will grant its permission. From this it would appear to have been held in the United States that the State power can tax the franchise of a corporation created without the State, but only on the ground of its being a license or permission to do business within the State, but the taxing power of a State exceeds that of a Province. It extends to the regulation of trade in the State, and to all powers of taxation not expressly surrendered by the State. It is not by its charter limited to taxation within the State. This doctrine, I apprehend, would be inapplicable to the circumstances of the Provinces and their relations to the Dominion. It would be likely to lead to mischief, and I think ought to be open to question even in the United States. In the case of *Paul* v. *Virginia*,[1] it was held that corporations were creations of local law, and had not even an absolute right of recognition in other States, but depended for that and for the enforcement of their contracts upon the assent of the State (where their contracts were sought to be enforced), which might be given accordingly, on such terms as they pleased. In the present case, what has been attempted to be taxed has not been brought within the jurisdiction of the Legislature of the Province of Quebec. The tax is on its paid-up capital whose situs is without the Province. As to whether the tax is direct or indirect, I entertain no doubt in my mind that it is, in its nature, a very indirect tax. It is not on property nor on persons, and it has to be collected not directly from the object taxed, but indirectly by operating on the agency and property which the corporation may have in the Province, not certainly from its franchise or paid-up capital, therefore to my mind very manifestly indirect; but on the general question as to what are direct and what are indirect taxes, I have found it difficult to arrive at any well defined recognized line of distinction. As near as I can arrive at what should be reckoned a direct tax, it is one levied immediately on property or

[1] 6 Wallace, p. 168.

persons and perhaps on income. I doubt whether in any case a tax on a corporation or company as such, that is on its capacity to exist and to do business, could be ranked in either of those classes. If its proper situs were without the jurisdiction of the taxing power, it could not be legally taxed. In any case its shares held within the province and any of its property there situate, would as such be liable to taxation in the same manner as other property pertaining to individuals. The taxation of domestic corporations and companies would be open to the objection of duplicate taxation, and would to my mind be an indirect tax, as one in the nature of a license imposed upon their capacity to exist and do business, and which would have been classed as a license tax had it been intended to empower the levying of it, on the provincial government. I am not quite certain that their lordships of the Privy Council did not intend to decide squarely in the case of the *Attorney-General* v. *The Queen Insurance Company*, that a tax of the nature of the one now in question was unconstitutional in whatever form imposed, whether called a direct tax or by whatever name it was intended to be levied. They certainly ruled in in that case that the tax was indirect, and as regards classification I cannot distinguish it from the one now in question. They also held that the act in question was virtually a stamp act, although in name a license act. The case of *Severn* v. *The Queen* seems also directly in point.

Whoever remembers the general sense in which the subject was discussed in the press and by politicians before and at the time of confederation, will have little difficulty in recognizing the nature of direct taxation as then understood, at least in the then province of Canada. They doubtless had in view the example and received construction of the terms in the United States, the burden was looked upon as one which would fall upon real estate. The charges of government had been sustained for the most part by customs duties on imports, to which something had been added by the license power. Except for

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municipal purposes, for the most part in the cities, there had been no imposts on property or persons. As expenses of the government increased, there was an apprehension that these might have to be resorted to. A resort to this mode of raising revenue was looked upon as an extreme measure, and one likely to be very unpopular, but of possible necessity, not likely to be resorted to so long as the government could exist and carry on its functions by only taxing imports.

In forming the confederation the danger must have been foreseen of allowing the local governments the power of indirect taxation. It would obviously be their interest to exist and defray their charges by imposts upon the trade of the country, more especially the through trade, and their inclination would naturally lead them to avoid a direct charge on their constituents. It was of importance that trade should not be embarrassed by local burdens, hence its regulation was assigned to the Dominion. I cannot think that a tax upon corporations or companies as such, can be considered a direct tax, more especially on those having their proper situs without the province, nor can such tax be held legal in the face of the other reasons already stated. I therefore concur in the judgment rendered in this case by the Superior Court. I hold that the tax in question in this cause is unconstitional and void, and that the judgment of the Superior Court in this case should be confirmed. I am, however, with the Chief Justice in the minority as regards the opinion entertained by this court.

TESSIER, J.:—

Après les longues dissertations faites par mes collègues qui m'ont précédé et les nombreux précédents et autorités qui ont été cités et commentés, il est assez évident que la matière est épuisée et je ne veux pas m'exposer à faire des observations qui ne seraient qu'une répétition de ce qui a été dit.

Je me contenterai de mentionner brièvement les propositions qui résument mon opinion.

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1. L'acte de la Confédération a conféré des pouvoirs distincts en certains cas et des pouvoirs concurrents en certains autres cas au parlement fédéral et aux législatures provinciales.

Les législatures provinciales sont des gouvernements qui ont les droits et priviléges inhérents à l'exercice d'un gouvernement; la mention spéciale de certains droits particuliers dans la section 92—n'est qu'énonciative, surtout en considérant la sous-section 16 qui dit: "et généralement toutes les matières d'une nature purement "locale ou privée dans la Province."

Le droit de taxer pour prélever un revenu et payer les dépenses publiques n'est pas un attribut de la souveraineté sous la constitution anglaise, mais un droit inhérent des parlements et législatures qui sont des gouvernements représentatifs du peuple.

Dans la cause de *La Reine & Hodge*, l'un des juges du Conseil Privé s'est exprimé ainsi:

"Dans les limites de sa juridiction et dans la sphère de "ses pouvoirs, la législature locale est suprême et a la "même autorité que le parlement impérial ou le parle-"ment de la Puissance auraient dans les mêmes circons-"tances pour conférer à une institution municipale, ou à "un corps de sa création, l'autorité de faire des règlements "ou de passer des résolutions relatives aux sujets spécifiés "en cette section ou pour la mettre en opération et en "assurer l'effet."

2. La taxe en question en cette cause est une taxe directe; il est vrai que l'acte de la Confédération ne définit ce que c'est qu'une taxe directe, ni aucune de nos lois. La présente taxe n'est, après tout, qu'une contribution mobilière ou une taxe mobilière qui n'est qu'une taxe directe.

Ce qui est le plus certain, c'est qu'à part la taxe directe sur les personnes ou la taxe indirecte sur les marchandises importées, c'est que sur toutes les autres taxes les économistes ne s'accordent pas et sont en contradiction, comme le dit Cooley, on Taxation, p. 5: "The term direct "taxes is employed in a peculiar sense in the Federal "Constitution," en Angleterre, en France et aux Etats-

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Unis, lorsqu'il s'agit de les classer en taxe directe ou indirecte. Les définitions aux Etats-Unis ne peuvent s'appliquer ici, comme dit M. Leroy-Beaulieu, dans son "Traité de la science des Finances" tome 1er, p. 214; après avoir démontré que la définition des impôts *directs* et *indirects*, donnée par l'administration, dans différents pays, n'est pas toujours exacte, il propose la suivante comme étant la plus scientifique et la plus satisfaisante qu'il ait pu trouver:

" Par l'*impôt direct* le législateur se propose d'atteindre " immédiatement du premier bond et proportionnellement " à sa fortune ou à ses revenus, le véritable contribuable; " il supprime donc tout intermédiaire entre lui et le fisc, " et il cherche une proportionnalité rigoureuse de l'impôt " à la fortune ou aux facultés.

" Par l'*impôt indirect* le législateur ne vise pas immédiate- " ment le véritable contribuable et ne cherche pas à lui " imposer une charge strictement proportionnelle à ses " facultés: il ne se propose d'atteindre le vrai contribuable " que par ricochet, par contre-coup, par répercussion: il " met des intermédiaires entre lui et le fisc, et renonce à " une stricte proportionnalité de l'impôt dans les cas parti- " culiers, se contentant d'une proportionnalité relative en " général."

M. Passy, qui a fourni au *Dictionnaire de l'Economie Politique*, publié par MM. Coquelin et Guillaumin, l'article traitant de *l'impôt*, dit aussi:

" C'est un usage reçu de diviser les impôts en deux caté- " gories distinctes. On appelle *directs* ceux que les contri- " buables acquittent eux-mêmes pour leur propre compte: " on appelle *indirects* ceux dont certains d'entre eux ne " font que l'avance et dont ils obtiennent le rembourse- " ment des mains d'autres personnes."

Mill—*Principles of Political Economy*, Livre 5, ch. 3, sect. 1, nous dit:

" Taxes are either *direct* or *indirect*. A *direct tax* is one " which is demanded from the very persons who, *it is* " *intended or desired* should pay it. *Indirect taxes* are those " which are demanded from one person in the expectation

" and intention that he shall indemnify himself at the " expense of another: such are the *excise* or *customs*."

Walker—*Science of Wealth*, p. 338:

" *A direct tax* is demanded of the person who, it is " intended, shall pay it. *Indirect taxes* are demanded from " one person, in the expectation that he will indemnify " himself at the expense of others."

Tel est le système qui est le plus généralement adopté aujourd'hui.

Une compagnie incorporée n'est qu'une personne juridique dans le sens de nos lois; cela est défini dans notre code civil, art. 17, sous section 11—" Le mot personne com- " prend les corps politiques et incorporés."

En interprétant ces définitions il me paraît évident que c'est une taxe directe sur la personne juridique ou légale qui paie directement la taxe. L'actionnaire est atteint directement, parce qu'il est confondu avec la corporation comme membre de cette corporation. C'est le capital commun de la corporation qui est taxé. Ce n'est pas une licence ni une taxe sur la franchise, parce que rien dans cette loi en question n'empêche la banque de continuer ses transactions; chaque part ni les affaires de la compagnie incorporée ne sont taxées.

3. Quelque soit l'opinion théorique des économistes sur les taxes directes ou indirectes, la taxe actuelle est une taxe que la législature de Québec avait le pouvoir d'imposer, en prenant l'ensemble de notre constitution. En disant que la législature a le droit d'imposer les taxes directes, il me semble qu'on a voulu simplement consacrer que les législatures provinciales n'auraient pas le droit d'imposer de taxes sur les importations, qui est le grand exemple reconnu de la taxe indirecte. En mettant la question, si la taxe en question en cette cause sera payée indirectement par d'autres, comme dans le cas de marchandises importées, on peut dire que cette taxe sur le capital des sociétés ou compagnies incorporées est une taxe directe qui n'affecte que la corporation et non pas les personnes qui font affaires avec elle. Les actionnaires et la compagnie incorporée ne font qu'un, c'est la même personne formant un être unique juridiquement.

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Quant à l'objection que le capital des banques et autres compagnies incorporées est en plus grande partie situé hors de la province, c'est une objection spécieuse, mal fondée ; le capital d'une banque n'est pas divisible, il est censé exister en entier et répondre en entier pour les affaires où il y a un bureau ouvert. Par exemple, un déposant qui dépose mille piastres dans la Banque du Commerce à Montréal a droit de se fier à tout le capital de cette banque et a recours pour la remise de son dépôt contre le capital entier de la banque, quoique cette banque emploie une grande partie de son capital dans la province d'Ontario. Par un effet de la loi, une banque ou une compagnie incorporée transporte tout son capital dans tous les lieux où elle transige des affaires.

Il y a des actionnaires résidant hors de la province, en Angleterre, aux Etats-Unis, cela ne fait rien, il n'y a qu'un être moral et juridique dans lequel sont confondus tous les actionnaires, n'importe où ils résident. Par exemple, supposons que le parlement fédéral ait imposé la même taxe dont il est ici question, sur les banques, ces institutions pourraient-elles éviter de payer ces taxes, en alléguant que partie de leurs actionnaires demeurent en Angleterre ou ailleurs, et que partie de leur capital est engagée dans un de leurs bureaux établis en Angleterre ou aux Etats-Unis ? Evidemment, cette objection serait rejetée ; pourquoi ne le serait-elle pas, lorsqu'il s'agit de la même taxe imposée par la législature de Québec ?

L'acte de la Confédération a été fait dans le but de concilier les intérêts et les droits de province pré-existant ; cet acte doit être libéralement interprété. Ce n'est qu'une alliance fédérale, dans laquelle chaque province a été constituée avec un gouvernement régulier ; ces provinces doivent raisonnablement et libéralement avoir le droit de se maintenir et de prélever les revenus nécessaires à leur maintien.

Si on eut voulu limiter les pouvoirs des législatures provinciales à certains sujets particuliers, pourquoi n'aurait-on pas défini ces pouvoirs et dit ensuite que tous les autres pouvoirs appartenaient au Parlement Fédéral. Au

contraire, il a fallu spécifier dans la section 91 les pouvoirs particuliers de ce parlement dans certains cas, comme dans un traité entre deux parties indépendantes qui spécifie les droits appartenant à chacune des deux.

Les compagnies incorporées forment une classe générale de gens qui exercent dans l'Etat des priviléges de commerce sans être responsables sur leurs propres biens comme les autres individus, mais avec limitation de responsabilité. Ce n'est que juste qu'ils contribuent aux revenus de la province dans laquelle ils font affaires dans un but de profit.

A mon avis, l'acte de la Confédération est un modèle de législation que j'ai toujours admiré. Il a fallu un grand effort de science, d'intelligence et d'expérience pour avoir compris dans une loi de 147 articles le règlement des intérêts si variés de plusieurs provinces couvrant un immense territoire, avec des systèmes de loi différents. Les termes généraux dont on s'est servi montrent qu'on a voulu donner une élasticité nécessaire dans notre constitution. C'est à nos tribunaux de donner une interprétation raisonnable pour concilier tous les intérêts et non pour créer et favoriser ceux qui sont disposés à élever des conflits.

Il me semble parfaitement raisonnable que ces compagnies incorporées, qui ont la protection des lois provinciales, qui profitent de nos lois de police et municipales, fournissent leur part de revenu pour le soutien de notre gouvernement provincial.

Je concours volontiers dans le jugement de cette cour, qui maintient cette taxe comme étant constitutionnelle; elle n'est pas excessive, elle est raisonnable et justifiable, et je crois qu'elle doit être maintenue.

RAMSAY, J. :—

One of the learned counsel who addressed the court said that, instead of getting clearer, the dividing line between federal and local powers was getting more obscure. Unfortunately this pessimist view of the matter is not altogether unreal. Opinions are very divergent,

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and many of those who are qualified to speak, and who, moreover, are entitled to speak with authority on the subject, seem to disagree irreconcilably on questions of the utmost importance. This is not altogether satisfactory, it must be confessed; it is our duty, however, not to be discouraged but to strive manfully to find out the solution of all these difficulties. Some solution there must be; and it will be discovered by those alone who seek for truth and not for triumph; and, above all, by those who are not seeking to further some cherished political dream or selfish project. In deprecating certain kinds of discussion, it does not follow that one dreads strife, or is alone content to see a cautious reserve or a lethargic indifference. On the contrary, it is salutary that every possible position should be debated with the utmost zeal, and with the keenest logic. What is to be deplored is the waste of time and effort, and sometimes talent, which could be turned to better account, in sustaining impossible themes or in circulating irritating subtleties. If confederation is to be a success we must interpret the constitution with the utmost loyalty. In great measure the responsibility of this task devolves upon the courts. At all events, there the questions in their most abstract form present themselves, and therefore it is that every judicial utterance on this subject should be given forth under the sanction of the gravest responsibility. We are dealing, not with a trifling statute passed to regulate some paltry concern, but with the Constitution of, perhaps, a great nation. Speaking with the fullest consciousness of this responsibility, I do not hesitate to say that to pretend that the Acts of 1774 and 1791 have any direct bearing on the interpretation to be given to the B. N. A. Act appears to me to be neither loyal nor honest. Again, to magnify the powers of the Federal Parliament, by a forced interpretation of the Constitutional Act, so as to absorb almost all the local powers, is disloyal and dishonest.

Being of this mind I adopt unreservedly the doctrine put forth by those opposed to the tax complained of, when they say, that the powers of the provinces are all

to be found consigned in the Constitutional Act and its amendments; and by parity of reasoning it must be admitted that the federal powers are derived from the same source. We may say of Canada, as C. J. Marshall said of the United States, and with greater emphasis: "This government is acknowledged by all to be one of enumerated powers;"—*McCulloch* v. *State of Maryland*.[1] Hence we have the doctrine everywhere proclaimed that the local legislatures are as omnipotent within the spheres of their powers as the Dominion Parliament is within its jurisdiction. It would be difficult to arrive at any other conclusion, for when the Queen, Lords and Commons give a power it cannot be questioned by any other authority. The extent of the grant may alone be questioned.

Lest it be thought that I unwittingly neglect advice proffered by high authority, I shall at once refer to a *dictum* of the Privy Council which now especially demands our attention, and which, it appears to me, may be easily misunderstood. In the case of *The Queen Insurance Co. & Parsons*,[2] their lordships said, referring to the difficulty of arriving at the proper interpretation of the language of sects. 91 and 92: "In performing this difficult duty it will "be a wise course for those on whom it is thrown to "decide each case as best they can, without entering "more largely upon an interpretation of the statute than "is necessary for the decision of the particular question "in hand. If this rule were adopted literally it would be the enthronement of empiricism. But it is to be observed that their lordships only gave this caution when dealing with the dangers of the double enumeration of sections 91 and 92, and the evident misuse of the word *exclusively* in each section. The warning was against making precedents before experience had given a guide as to the working of the new constitution. So considered, I recognize the wisdom of the caution, and I invoke it as an admission of great authority, that the work of reconciling these conflicting expressions must go on till all the

[1] 4 Wheaton, 405.

[2] 3 H. of L. and P. C., 1090; 22 L. C. J., 307; 1 Leg. News, 410.

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possible cases have been disposed of. The special application of this admission will appear more clearly later on.

From another quarter we have recently received an intimation as to our duty, which also demands our notice, and requires qualification. The learned Chief Justice of the Supreme Court is reported to have said that all the Courts in Canada were *bound* by the decisions of the Supreme Court. In this saying there is just that grain of truth which is dangerous. It is a rhetorical rather than a legal way of putting the matter. "*Aiunt rhetores, judicatum esse partem juris.*" There is no such institution of the law as that laid down. The decision binds in the particular case; it is only a rule of authority in other cases. Now the basis of authority is reason, and, therefore, that only which is reasonable is authoritative. It is doubtless very inconvenient that jurisprudence should be uncertain, but it would be still more inconvenient if courts, out of an obsequious deference, adopted as law that which clearly is not law. In practice we follow a middle course, which, while it tends to avoid the perpetuation of error, to some extent renders the administration of justice certain. Volumes of over-ruled cases and the *dicta* of very distinguished judges and jurists attest the correctness of this remark. In *Hogan et al. & Bernier* (21 L. C. J. 101) a very able judge, now no more, referring to the case of *Dorion & Hyde*, said: "Je ne me crois pas lié par ce précédent, et je regretterais de donner mon concours à l'établissement d'une jurisprudence que je crois erronée." The precedent, which Mr. Justice Dorion deemed himself justified in rejecting as authoritative, was a judgment of the Court of Appeal confirming a judgment of his own court in review. To this I shall only add what Hale says on the point: "It is "true the decisions of courts of justice, though by virtue "of the laws of this realm they do bind, as a law between "the parties thereto, as to the particular case in question, "till reversed by error or attaint, yet they do not make a "law, properly so called, for that only the king and par-"liament can do; yet they have a great weight and

" authority in expounding, declaring and publishing what " the law of this kingdom is, especially when such deci- " sions hold a consonancy and congruity with resolutions " and decisions of former times." Hist. of Common Law, chap. 4, vol. 2, p. 142. I allude to this specially as the authority of precedents has been particularly insisted on in these arguments, and it seems to me well to observe that two things are to be examined when considering a precedent: 1. Whether it is precisely in point. 2. Whether it will stand the test of reason. And in deciding as to this last, whether it has been assented to at all times.

The case of *Angers & The Queen Ins. Co.* has been relied upon as conclusive authority against the validity of the present tax. To me it appears to decide absolutely nothing that has to be decided in this case. Firstly, then, let us examine what was submitted to the Privy Council, and what was decided there. When the case came before us, only two propositions were submitted, (1) whether the tax was a direct tax, and consequently under par. 2, of sect. 92; (2) whether it was, as it was called, a license, under par. 9. Here it was held, unanimously, that the particular impost then in question was not direct taxation, and, by the majority, that it was not a license within the terms of par. 9. This decision was confirmed by the Privy Council. Had the determination of these issues been all the scope given to the case, the decision might not have done much mischief, but unfortunately one of the learned judges in this court, in delivering his opinion entered upon a discussion of questions of political economy, purporting to be supported by quotations, which was evidently intended to lay down a general and authoritative distinction between direct and indirect taxation in all cases. It is an ungracious task to criticize a work which necessitated considerable labour on the part of its author; but it has obtained some recognition, and to my mind it seems so fallacious that I deem it my duty to combat its method and its conclusions on the first opportunity. I may add to this, that the speculations on the subject of political economy, which it is sought to incorporate into the law

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as recognized truths, are peculiarly liable to misconception. Archbishop Whately, in his lectures on political economy, recommends the student to consider "a clear definition of technical terms, and careful adherence to the sense defined as the first—the most important—and the most difficult point in the science of political economy," Lect. IX. Disregarding all such caution it was unhesitatingly asserted that all the authors were agreed, French, English and American, legal and lay, on the line of demarcation, between direct and indirect taxation. Strictly speaking, with the writings of political economists we have nothing to do. If a technical meaning is to be given to a word or words in a statute, that meaning must be proved by testimony and not by books, like every other fact. We do not even accept foreign law, of which the course of our studies might enable us to know something, on the authority of books; how then could we be expected to guard ourselves from error if we attempted to deal with the technicalities of particular sciences, of which we may be presumed to be perfectly ignorant, on scraps culled from the works of speculative writers?

I do not, then, feel myself obliged to show that the scientific writings submitted to us do not sustain conclusively the theories they were brought forward to support; but the course followed in the case of *Angers* v. *The Queen Ins. Co.* illustrates so fully the evil of neglecting the ordinary rule I invoke that I shall not hesitate, once for all, (to protest against an evil practice not to create a precedent), to point out the errors to which it has given rise. It was evidently expected that we should understand that the division between direct and indirect taxes was this, that a direct tax was one which the person who paid it was not expected to get out of another; while an indirect tax was one for the payment of which he expected to be recouped. That this was the lesson supposed to be taught, and on which all the economists were said to be agreed, is beyond question, for it was repeated several times at the argument of the cases now before us. In one place Mill says something like

this. I quote from the passage on which Mr. Justice Taschereau relied to show that he agreed with everybody and everybody with him: "A direct tax is one which is "demanded from the very person who it is *intended* or "*desired* should pay it. Indirect taxes are those which are "demanded from one person in the *expectation* and *intention* "that he shall indemnify himself at the expense of another, "such as the excise or the customs," etc. But this brilliant writer carries his doctrine out, for he adds: "Most taxes "on expenditure are indirect, but some are direct, being "imposed, not on the producer or seller of an article, but "immediately on the consumer." Now how does this test correspond with what Adam Smith says: "A direct "tax operates and takes effect independently of consump- "tion or expenditure, while indirect taxes affect expenses "or consumption, and the revenue arising from them is "dependent thereon."

These systems, then, are totally different, and, I take it, neither indicates the meaning of parliament in enacting par. 2, sec. 91 B. N. A. Act. Again, many of the economists, and Mill amongst them, classify taxes into direct and indirect. However, in *Hylton* v. *The United States*, Chase, J., said: "I believe some taxes may be both direct and indirect at the same time." Mill also says, "The financial systems of most countries comprise a variety of miscellaneous imposts *not directly included in either class*," *i.e.*, of direct or indirect taxes: Pr. of Pol. Econ., chap. V, p. 1. The legal definitions in France of *contributions directes et indirectes* do not cover the whole ground of taxation. See what Merlin says as to the *droits d'enregistrement*. He shows they are not indirect under the definition, and certainly they are not direct according to their system.

Turning to the French system, no similarity can be expected between the French and English writers, for the former write under laws which leave little room for doubt as to what is a direct tax in France, and what an indirect one. In one of the scraps quoted from Say, he tell us this; and a note, on the very next page to that quoted by Mr. Justice Taschereau, is specially inserted to

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prevent the cursory reader making the mistake into which the Privy Council all but irretrievably fell. Merlin and Favard de Langlade are also perfectly clear on the point. In fact it is difficult to understand how any one could have copied extracts from these precise writers without seeing that they were exposing a definite, and to some degree an arbitrary rule, and not playing with theories.

In England there are no legal writers on this subject, for there is no legal distinction between the two imposts, and the economists use the terms direct and indirect rather to describe the incidence of the impost, which is often influenced by circumstances over which the legislature has no control, and which it does not even contemplate, than to define terms or to make an abstract classification. Mr. Dudley Baxter admits this:—"One of the oldest and most simple definitions divides all taxes into the two heads of direct and indirect taxation; direct taxes being those which are paid by the person himself, who is meant to be the real contributory, such as assessed taxes, and indirect being those which are paid by an intermediary, who re-imburses himself from the real contributor, such as the customs and excise duties. But this definition cannot furnish us with a trustworthy classification, since it is founded upon an accident in the manner of payment and not upon the nature of the taxes themselves. The income and property tax, for instance, is direct taxation when paid by the owner himself, and indirect when paid by the tenant or mortgagor." The Taxation of the Kingdom: R. Dudley Baxter, page 20. It is otherwise in the United States and France, and also here. By the constitution of the United States a direct tax is imposed differently from an indirect one. Art. 1, sec. 9, par. 4. Hence the courts have been called upon to designate the classes in order to decide whether the impost is legal or not. In France the question comes before the courts in diametrically the reverse way, for there a tax becomes direct or indirect, not by any quality in the nature of the tax, but by the mode of its imposition. In France it is not a question of expenditure or recoup-

ment, but whether the tax is on the person or on a product. Thus the taxes on industries (*patentes*) are all direct, while the tax on theatre tickets is indirect. After saying what is quoted by Taschereau, J., p. 421, Say goes on to establish the real distinction in France, p. 522:

"Pour asseoir les contributions directes en proportion du revenu des contribuables, tantôt les gouvernements exigent des particuliers l'exhibition de leurs baux, etc., et demandent au propriétaire une part de ce revenu; c'est la contribution foncière.

"Tantôt ils jugent du revenu par le loyer de l'habitation que l'on occupe, par le nombre des domestiques, des chevaux, des voitures qu'on entretient, et font de cette évaluation la base de leurs demandes: c'est ce qu'on nomme en France la contribution mobilière.

"Tantôt ils estiment les profits que l'on peut faire suivant l'espèce d'industrie que l'on exerce, l'étendue de la ville et du local où elle est exercée: c'est la base de l'impôt qu'on appelle en France les patentes.

"Toutes ces manières d'asseoir l'impôt, en font des contributions directes.

"Pour asseoir les contributions indirectes et celles dont on veut frapper les consommations, on ne s'informe pas du nom du redevable; on ne s'attache qu'au produit. Tantôt, dès l'origine de ce produit on réclame une part quelconque de sa valeur, comme on fait en France pour le sel.

"Tantôt cette demande est faite au moment où le produit franchit les frontières (les droits de douanes) ou l'enceinte des villes (l'octroi).

"Tantôt c'est au moment où le produit passe de la main du dernier producteur dans celle du consommateur, qu'on fait contribuer celui-ci, (en Angleterre par le *stamp duty*, en France par l'impôt sur les billets de spectacles).

"Tantôt le gouvernement exige que la marchandise porte une marque particulière qu'il fait payer, comme le contrôle de l'argent, le timbre des journaux.

"Tantôt il s'empare de la préparation exclusive d'une marchandise, ou d'un service public, et les vend à un prix monopole, comme le tabac ou le transport des lettres par la poste.

"Tantôt il frappe, non la marchandise elle-même, mais l'acquittement de son prix, comme il le fait par le timbre des quittances et des effets de commerce.

"Toutes ces manières de lever les contributions les rangent dans la classe des *contributions indirectes*, parce que la demande n'en est adressée à personne directement, mais au produit, à la marchandise frappée de l'impôt."[1]

[1] [Note de l'auteur.] "Et non parce qu'elles atteignent indirectement le contribuable; car, si elles tiraient leur dénomination de cette dernière circonstance, il faudrait donner le même nom à des contributions très directes, comme, par exemple, à l'impôt des patentes, qui tombe en partie indirectement sur le consommateur des produits dont s'occupe la patente."

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The similarity of the systems and the unanimity of writers on the subject, generally speaking, is the wildest delusion, it appears to me; but there is one point common to the legal systems existing in France and in the United States, not unimportant to us, which, curious to say, has escaped the notice of our economist jurists. The common principle to which I refer is this, that the division between direct and indirect taxation is necessarily arbitrary. In France it is formally, and in the United States practically so. In the case of *Hylton* v. *The United States*, Hamilton attempted to lay down a scientific basis for the distinction, but Chase, J., was not misled either by the eloquence or the ingenuity of that distinguished advocate, and he expressed the opinion that, within the meaning of the constitution, a direct tax was on the person and on land, and perhaps, on revenue. This has since been confirmed in *Springer* v. *United States* (102 U. S. Reports), from which we learn that Hamilton's opinion was really in favour of the judgment in the Hylton case. Now with us there is no doubt that a tax on revenue is of the same nature as a tax on land, and consequently if the one is direct taxation so is the other.

At the argument a strange proposition was advanced, namely, that a poll-tax is not a direct tax unless it is general. It is Mill who says that if a tax is not general it may be avoided, and therefore it is not direct taxation. His reasoning is, that if you tax carpenters and not masons, the carpenters may all become masons. We need not inquire, fortunately for us, how this accords with the consumer argument already mentioned, but what he says only illustrates more fully what I have adverted to already, that the English economists are not dealing with a term but are speculating on results which the terms direct and indirect do not express adequately; and that if we were to be guided by what they say, there would be no means of arriving at a conclusion as to what constitutes direct taxation, and we should, therefore, be obliged to say that there was no such thing. By a similar process of reasoning, we could

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more easily arrive at the conclusion that there was no such thing as indirect taxation, and by a little development of this plastic logic we might perhaps arrive at the happy delusion that we are not taxed at all. The passage from Mill to which I refer, is in Book v., ch. iii., § 3, Prin. of Political Economy.

It is only too clear that there is no scientific distinction between direct and indirect taxation, even if we might properly consult scientific books to learn the value of technical terms. But without the aid of the writers on political economy we must define it, as it has become a law term with us. I am not aware that there is any reason for me to modify what I said in *Angers* v. *The Queen Insurance Co.* with regard to this matter, for although the late Master of the Rolls, in giving the judgment of the Privy Council, seemed to be influenced to some extent by the apparent unanimity of the writers, he very guardedly decided that "*such* a stamp imposed by the legislature is not direct taxation." I have no difficulty in conforming myself to this *dictum*. It is precisely what we all held here. With regard to the other question decided in that case, namely, whether license or not, it does not arise in this case.

We therefore come to the first point we have to decide, whether the tax now in question is within the ruling of the case of *Angers & The Queen Insurance Co.* or not, and if not, whether it is direct taxation within the meaning of the B. N. A. Act?

On the first part of this question there is hardly room for a difference of opinion. In the former case the tax was levied on anyone who might insure. The present tax is on every Canadian bank, &c., doing business in the Province of Quebec, and the measure of the charge is the paid-up capital of the bank. There is also a business tax. At the argument the contention that the tax was not direct seemed ultimately to be confined to the consideration that it was not a tax on property within the province, or on the property of persons residing in the province, or even a tax on property, but that it was a tax on the

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franchise. I presume that a tax on the franchise means a tax on those privileges which go to make up the corporation, and consequently it is a tax on the person. If the position be correct that any tax on the person, his property or his revenue is direct taxation, in the meaning of the B. N. A. Act (and there is no decision contravening it), then a tax on the franchise of a corporation is a direct tax, for a corporation is a person. The law of this province lays down in express terms that "every corporation legally constituted is an artificial or ideal person * * enjoying certain rights and liable to certain obligations (352 C. C.). They are also subject to certain disabilities (364 C. C.). I understand that these articles express correctly the law of England on this subject as well as our law. Smith's Mercantile Law, chap. 4. There is certainly nothing in our law which could possibly suggest the idea that a corporation might not be made liable to a personal tax, and assuming the law of England to be the same, I am forced to the conclusion that a tax on the person, or on the franchise of a corporation, is no exception to the general rule of sub-sect. 2, sect. 92. Of course in the United States a tax on the franchise could not be direct taxation within their constitution; because it could not be adjusted according to the census. And this explains the case of the *Bank of Commerce* v. *New York City*; (2 Black, 628), and also, I presume, the case mentioned by Hilliard (Law of Taxation, ch. 1, par. 36, p. 20), reported 36 Conn. (512-528), which I have not seen. What I understand to be laid down by these cases is this:—A tax on nominal value is not a tax on property, for evidently since the tax is imposed on the nominal value its quality as property is disregarded; it is therefore a tax on the franchise which cannot be adjusted. But, said Mr. Justice Nelson, a tax on the estimated value is a tax upon property, and consequently is direct taxation. As to the tax in question not being a tax on property, the statute (45 Vic., c. 22, Q.) does not impose it as a tax on property, but as a tax on banks, &c., carrying on business in the province. Then by section 3 it regulates how each of these

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ideal persons shall be charged. Here it is necessary to distinguish the cases, and first I shall deal with banks. They are to pay not on the nominal value of their capital, but on their paid-up capital. Now, if it be maintained that this tax is not a tax on the person, I do not see how it can be maintained that it is not a tax on property. There is nothing in our constitution which declares anything as to uniformity of taxation, and, therefore, it is no legal objection to a tax that it is not levied upon any general system of valuation. The power to assess being admitted, its measure is a matter of discretion, subject to the power of disallowance by the Dominion government. It is not a legal question.

The next point is, that it was not taxation of persons within the jurisdiction of the legislature of Quebec. This difficulty does not appear to me to be formidable. The persons taxed are not the shareholders but the banks or other corporations. The shareholder is never by law confounded with the ideal person, so he can sue the corporation like any other stranger. Smith's Mercantile Law, *loc. cit.* There is nothing in paragraph 2, section 92, to confine the tax to persons domiciled in the province. What the statute says is, that the taxation must be within the province, or, in other words, that the provincial government cannot execute its laws beyond its jurisdiction. It scarcely required the words "within the province" to establish this. Hilliard (chap. 1, par. 5, page 5) says:— "The power of taxation * * is necessarily limited to "subjects within the jurisdiction of the state. These sub-"jects are persons, property and business." The statute does not propose to tax persons outside the province, but persons carrying on business within it and benefiting by its organization and government. It is an evident error to say that a person is only liable to the laws of his domicile. By his acts he may make himself personally liable to the laws of many countries without ever leaving the place of his birth. A Frenchman, who has never been out of Paris, might become liable to a business tax in Montreal, and I dare say that such an impost could be

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collected, as any other debt, in the French courts. If an individual be thus liable why should a corporation escape a similar liability ?

The last point is that the property is not within the province. This difficulty is more substantial, and if the tax were not also personal I would be inclined to think it valid as regards banks not having their domicile in Quebec, unless it were shown that their stock was there; but as I have already said the tax appears to me to be personal and to be of the most direct kind, and therefore the question does not affect the cases before us. As to those having their principal place of business in the Province of Quebec, the question could not arise on any supposition.

Again, as to the argument that a business tax is not direct, I see nothing in that either in principle or in practice. It is notoriously false in principle that a tax on a profession or on a trade or on wages necessarily comes out of the pocket of the employer or the consumer. It stands on the same footing as a tax on profits, and profits are income, and a tax on income is direct taxation. See Say, Cours d'Economie Politique, T. 5, p. 420, where the result of taxing industries and wages is clearly treated. It will be observed that there are two distinct taxes on the banks, one on the person or on the franchise; the other a purely business tax. The taxes on insurance companies are purely business taxes. Incorporated companies for carrying on some trade, etc., are charged with a personal tax to be increased according to the amount of paid up capital over $250,000 and an additional tax for each place of business. These cover all the descriptions of corporations that have come before this court, and I think all the taxes they complain of are within the category of direct taxation. I have not referred to the question of excise, although Mr. Justice Taschereau, the ingenious originator of the numerous fallacies I feel myself called upon to combat, has drawn it into the medley. His error here is very easy of exposition. He has written on a mutilated text, at least as it is

given in Cartwright, p. 141. The full text of what Wharton says is this: "Excise, the name given to the duties "or taxes laid on certain articles *produced and consumed at* "*home;* but exclusive of these, the duties on licenses, "auctioneers and post-horses are also placed under the "management of the excise, and are consequently includ- "ed in the excise duties."—Wharton's Law Lexicon *vo.* Excise. To bring Mr. Justice Taschereau's logic into line we should have to say: Excise duties are direct taxes; certain duties not excise are collected by the exciseman. Therefore they are direct taxes. Really the functions of the guager, as he was irreverently called formerly, owing to the ordinary operations of his calling, have been extended; but that does not alter the nature of direct taxation, nor the meaning of the term in the B. N. A. Act. The argument of the learned Chief Justice differs notably from that of Mr. Justice Taschereau. He does not go on the strict definition of excise; but he says, in legislation excise has been made to include assessed taxes. Therefore we must presume that excise, in the contemplation of Parliament, includes all these taxes. If it had been our business to interpret the word excise, it might perhaps have been a consideration for us whether excise meant all the taxes collected by the exciseman. But the Act does not use the word "excise," except in a transitory clause, section 102, for certain taxes then imposed. It is not applied to the general power of taxation. It is the economists who say that excise duties are not direct taxes because they are similar to customs duties. To make it a rule of interpretation that because a particular word was used in a special sense in one statute, it should have the same interpretation in other statutes, having no relation to the same subject, would be the surest way of mistaking the intention of the legislature that could be devised.

There is another view of this case which, it appears to me, merits closer attention than it has received, and that is whether the B. N. A. Act has limited the local powers of taxation to "direct taxation within the province in order to the raising of a revenue for provincial purposes,"

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and to "shop, etc., and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes," and this to the exclusion of every other form of taxation. This enquiry demands an extended examination of the general scope or scheme of the B. N. A. Act. It has been said the local legislatures are not supreme legislatures. From a purely abstract point of view, no legislature is supreme. In other words, there are limits to jurisdiction, which are not identical with the physical power to execute. Public law is imperfect in this, that it has no constitutional power of execution; nevertheless it expresses a right. When De Hardenberg exclaimed at the Council of Vienna: "*Que fait ici le droit public?*" Talleyrand replied: "*Il fait que vous y êtes.*" Again, jurisdiction has moral limits, for it has no authority over conscience. Akin to this limit is the non-assent of the subject, and so laws become obsolete. It is only, then, relatively, that we can speak of a supreme legislature. Thus restricted, the Parliament of the United Kingdom is supreme as regards all the Queen's dominions. By force of that supremacy it granted the constitution to Canada set forth in the B. N. A. Act, 1867, and by the same power it has amended that Act. By the Act of 1867 and its amendments it has divided the powers of legislation between a federal legislature and local legislatures, in very different proportions. It is admitted that the local legislatures are as omnipotent within the scope of their legislative powers as the Dominion parliament is within its powers. It does not, however, follow from this that the federal organization has no supremacy over the local. Such a pretension would be utterly untenable, for the federal power, alone, has the power to nominate one of the branches of the local legislature, it can disallow its acts, it can turn local works into federal works, and it can create new provinces. The true doctrine seems to me to be this, that the federal power is not generally supreme relatively to the local power. Its supremacy consists in its power to influence indirectly the action of the local power, or to paralyse it to some extent, not in the power to destroy it. An

indirect attempt to destroy it would therefore be unconstitutional and unlawful. It is likewise generally admitted, as has been already said, that the powers of the local legislatures are enumerated in the constitutional acts, and by parity of reasoning it cannot be denied that the powers of the Dominion are also to be found there. Giving full effect to this principle, it must not, however, be supposed that it implies that all the powers given by the constitutional acts either to the Dominion parliament or to the local legislatures are specially enumerated. The general power given to the Queen, senate and house of commons is "to make laws for the peace, order and good govern- "ment of Canada, in relation to all matters not coming "within the classes of subjects by this act assigned exclu- "sively to the legislatures of the provinces." But among the matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces there are also general powers of legislation. They make laws as to "all matters of a merely local or private nature in the "province." Does this not embrace local taxation for local objects? And if not, why? There can be no question, I think, that taxation is a necessary attribute of government. A government that cannot tax would be a nullity, and the fact is that it is a power conferred in some degree or other on the most insignificant municipality in the country. They can impose property and income taxes, insurance taxes of all sorts and a poll tax. The general power to tax to any extent has always been recognized in the United States as an attribute of sovereignty, and I don't think there can be any English authority found to contradict this proposition. "The power of congress "to exercise exclusive jurisdiction in all cases whatso- "ever within the district of Columbia includes the "power of taxing it," *Loughborough & Blake* (5 Wheaton, 317). "The power of taxing is essential to the very "existence of government." 4 Wheaton, 428. This taxing power is an essential attribute of sovereignty, and can only be abridged by positive legislative enactment, clearly expressed. The power is not affected by a char-

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ter which is silent on the subject." Hilliard, Law of taxation, ch. 1, par. 85, p. 40. In answer to a question I put at the argument upon this point, Mr. Maclaren said that sub-sections 2 and 9, sect. 92, were impliedly a dealing with the whole question of the taxing power, for if the local legislatures had full powers to tax, these two sub-sections would have been unnecessary, and, therefore, the power to tax indirectly is impliedly taken away. This is a very ingenious argument, and the best, I fancy, which can be put forward, but I don't think it satisfactory. In the first place the rule of interpretation *inclusio unius, exclusio alterius* is one of the feeblest of the rules of interpretation, if it can be called a rule at all. The real rule is thus expressed by Pothier, No. 100: "Lorsque dans un "contrat on a exprimé un cas, pour le doute qu'il aurait "pu y avoir, si l'engagement qui résulte du contrat "s'étendait à ce cas, on n'est pas censé par là avoir voulu "restreindre l'étendue que cet engagement a de droit, à "tous ceux qui ne sont pas exprimés." It is a rule of the Roman law: "Quæ dubitationis tollendæ causa, contrac-"tibus inferuntur, jus commune non lædunt." L. 81, Dig. de regulis Jur.; L. 55, Mand. I find it equally imperatively expressed in the English law. Coke says: "It is "a maxim of the common law that a statute made in the "affirmative, without any negative expressed or implied, "doth not take away the common law." And Lord Hatherley, summing up the opinion of Mr. Justice Blackburn in *Ashbury R. Car and Iron Co.* v. *Riche*, says: "Then he (Mr. "Justice Blackburn) cites from old authorities to show "that when once you have given being to such a body as "this, you must be taken to have given to it all the con-"sequences of its being called into existence, unless by "express negative words, you have restricted the opera-"tion of the acts of the body you have so created." L. R., 7 H. L. 685. There are numerous cases supporting this doctrine in different ways. For instance, this distinction has been made between using words that are unnecessary and using words that are unmeaning; the former is readily supposed, the latter is never presumed.—*Auch-*

terarder v. *Lord Kinnoull*, 6 C. & F. 686. Words that are, strictly speaking, unnecessary may be used *ex majore cautela*. *Duke of Newcastle & Morris*, L. R., 14 H. L. 662; *Fryer & Morland*, L. R., 3 Ch. Div. 685. That is precisely what, I think, was done in this Act. The right to tax the person might have been questioned with much greater force than the right to tax indirectly, if nothing had been said. Besides this, there is a limitation in both sub-sections. Sub-section 2 allows exclusively direct taxation in order to the raising a revenue for provincial purposes, and section 9 authorizes legislation as to certain licenses in order to the raising a revenue for provincial, local or municipal purposes. In the third place it is, at all events, not an express exclusion of the general power to tax, which seems to be an inherent right of government; and in the fourth place, sub-section 16 covers any omission of the sort. To this I may add that if the arguments referred to were good in this case, the local legislatures could not legislate as to shops, saloons or taverns at all, except in regard to licenses, in order to raise revenue. This has never been pretended, and *Hodge & The Queen* is an authority to show that such a pretention would not be maintained, for what the legislature of Ontario did was, to create license commissioners with power to pass resolutions to close taverns and billiard rooms at certain hours. In *Blouin* v. *The Corporation of Quebec*, 7 Q. L. R. 18, Chief Justice Meredith gave a similar decision, as also in the case of *Poulin* v. *The Corporation of Quebec*, 7 Q. L. R. 337. The latter case was confirmed on appeal to this court, and also by the Supreme court.

One other argument has been put forward, with some plausibility, to show that parliament never intended to give the local legislatures the right to tax indirectly. It was said that certain speakers in Canada, who spoke on the resolutions, had expressed the idea that the local governments were to live on direct taxation and on the federal subsidy. It is very true that in France commentators allow themselves great latitude in referring to the history of the code; but the discussions in the council of state and in the

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tribune were of a very different kind from the discussions of a popular body like the house of assembly; and I am not aware that any weight is attached in France to the opinions of individual members of the assembly. Nothing, however, is better established in England than this, that the debates in parliament are not authority as to the interpretation of statutes. The cases are systematically arranged in Mr. Hardcastle's very carefully prepared treatise on the construction and effect of Statutory Law, p. 55. If there be any difference between the French and English law on this point, which I am inclined to doubt, we must, of course, reject the French rule. In referring to the acts of the legislature we express almost an excessive deference for them; but we compensate ourselves for this lip-loyalty to the words of the statute, by disregarding totally the sayings of the individual legislator.

This line of argument necessarily leads us to examine the rules as to the interpretation of statutes, and to a short digression in order to ascertain the fundamental principles upon which the right to tax rests, if it exists at all. The difficulty of these rules appears to me to be a good deal overrated. Their simplicity is so great the bookmakers can hardly find materials to make books about them. A statute, according to our ordinary use of the word, is an act of the legislature. Its dispositions are either clearly enounced or their terms are ambiguous. In the former case they are to be applied according to their terms, the language being taken to have the meaning popularly attached to it. In delivering the judgment of the Privy Council in *McConnel & Murphy*, L. R., 5 P.C., p. 218, Sir Montague Smith said: "In mercantile contracts, and "indeed in all contracts where the meaning of language "is to be determined by the court, the governing principle "must be to ascertain the intention of the parties, through "the words they have used. This principle is one of uni-"versal application." If the terms are ambiguous for any cause, whether it be from a vice of construction of a particular section, or from contradiction in the provisions of the statute, or from incompatibility with the general

meaning of the act, or because literal application would lead to an absurd conclusion as would frustrate the purposes of the act, then interpretation begins, and it is sought thereby to arrive at the true intention of the legislature. It is not a question of adding to or taking away from the act; but deciding what the act really means. There are a few legislative rules as to the mode of dealing with such difficulties; and also certain rules, derived from experience and reasoning, have been laid down as general guides in such matters; but the latter leave much to the discretion of the judges, because their delimitation is scarcely more extensive than each particular case. I think, however, it may be said, generally speaking, that in the interpretation of a statute *indiciæ* similar to those which guide us as to the intention of parties, in the absence of express declarations as to their intention, are applicable. Lord Blackburn has explained, with his usual breadth and precision, how the courts of law act in construing instruments in writing. He says: "a statute is an instrument "in writing. In all cases the object is to see what is the "intention expressed by the words used. But, from the "imperfection of language, it is impossible to know what "that intention is without inquiring further; and seeing "what the circumstances were with reference to which "the words were used, and what was the object appear-"ing from those circumstances which the person using "them had in view." *River Wear* v. *Adamson*, L. R., 2 App. Cas. 763. Another very great authority, Mr. Justice Hannen, has said: "I agree with Mr. Thesiger that an "appeal can only be given by the clearly expressed inten-"tion of the legislature. This must be ascertained by an "examination of the enactment which is the subject of "enquiry. It is not necessary that there should be any "particular form of words, but it is essential that an "intention to give an appeal should clearly appear." * * "The authorities that have been cited have not much "bearing upon this question, because in all cases the "intention of the legislature must depend to a great extent "upon the particular object of the statute that has to be

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"construed. I have come to the conclusion that the legis-
"lature intended to give an appeal in a case like the pre-
"sent." L. R., Q. B. vol. 5, p. 93. *The Queen* v. *Justices of Surrey*.

Taking these authorities as expressing the general rules for the interpretation of statutes, and which seem to be identical with those which obtain in France (see *H. M. Procureur & Bruneau*, L. R., 1 P. C. 191), it can scarcely be questioned that the preamble of an act is greatly to be considered in determining the intention of the legislature where there is any doubt as to the meaning of its terms. See also Menoch. de præsump. L. vi., Præs. 2, Nos. 2, 3, 4; and Comyns in his Dig. Vbo. Parliament, says:—"The "preamble is a good means for collecting the intent."

Now, if we come to the preamble of the B. N. A. Act, 1867, we find the objects of the statute generally declared. The third paragraph is in these words:—"And whereas on the establishment of the Union by authority of parliament, it is expedient not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the executive government therein be declared." The Act then goes on to prescribe of what the executive of the central government shall consist, after that of what the legislature, called parliament, shall consist. It then follows the same form of legislation for the local constitutions.

It would seem then beyond question that this Act attributes plenary governmental powers with regard to certain matters to both the federal and local bodies, and so far as I know this has never been doubted. We have therefore one point settled. The local organizations are governments. They enjoy regalian powers, and all the incidents of such powers; and these powers have not been limited by the charter, which, although it has specially passed on the taxing power, has been silent as to the powers of indirect taxation. To the last part of this argument, that is to say, that the right to tax generally has not been expressly taken away, it has been said that by sub-section 3, section 91, "The exclusive author-

ity of the parliament of Canada extends to the raising of money by any mode or system of taxation," and it is further provided that "any matter coming within any of the "classes of subjects enumerated in this section (*i. e.*, sec- "tion 91, of which taxation is one) shall not be deemed "to come within the class of matters of a local or private "nature comprised in the enumeration of classes of sub- "jects by this Act assigned exclusively to the legislatures "of the provinces," and that this is an express and not an implied taking away of the general right to tax. This is a formidable position. To the federal parliament exclusive authority is attributed, and the exclusiveness so given overrides even the declaration attributing exclusive power to the local legislatures. That is, the exclusive power of the former is absolute, that of the latter is subject to the condition that it shall not clash with the former. It is not easy to conceive words more clear than those of the B. N. A. Act to express this idea, nevertheless it has been universally admitted that this interpretation cannot be put upon the statute. In the case of *L'Union St. Jacques* v. *Belisle*, L. R., 6 P. C. 31, decided in 1874, Lord Selborne explained the necessity of reconciling the two enumerations. In 1877, in the case of *Angers* v. *The Queen Insurance Co.*, 3 H. of L. and P. C. 1090; 1 Leg. News, 410, I drew attention to this necessity, in these words: —"It would be a defensible position to say that the "proviso of section 91 so controlled sub-sections 2 and 9 "of section 92 as to render them inapplicable, although "I do not think this was the intention of the Imperial "parliament. But the majority of the court does not adopt "that view. * * The whole that the judgment about "to be rendered affirms is, that the particular mode of "levying a license adopted in the statute before us is "beyond the powers of the local legislature" (1 Cartwright, 131), and as I have already shown, it is that alone the Privy Council held in confirming the judgment of this court. (*Ib.*) They therefore impliedly rejected the short way out of the difficulty now suggested, as inadmissible.

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Later, in 1880, in the case of *Dobie* v. *The Temporalities Board*, 7 H. L. and P. C., 136; 5 Leg. News, 58, I argued that section 92 must be read with section 91, so as to modify the generality of sub-section "13 Property and civil rights in the province." The judgment of this court was reversed in the sense of the dissent, and no disapprobation of this doctrine was expressed. The following year the Privy Council in the case of the *Queen Ins. Co.* v. *Parsons*, 7 H. L. and P. C. 96; 5 Leg. News, 25, by a similar process of reasoning, restrained the generality of section 9, sub-section 2, "The Regulation of trade and commerce," in order to give scope to the local power over property and civil rights, and *L'Union St. Jacques & Belisle*, and *Cushing & Dupuy*, 5 H.L. & P.C. 136; 26 L.C.J. 170; 5 Leg. News, 58, were referred to as being in the same sense. Furthermore, the Privy Council enunciated the doctrine of progressive interpretation, to which I have already alluded in this opinion. To this it is answered—true so far, a general power will be restrained to give scope to a special power. This distinction does not meet the cases. In the case last mentioned, two powers general and exclusive, one attributed by section 91, the other by section 92, somewhat in conflict, were compelled to live together. In *Cushing* v. *Dupuy* it was a conflict of powers equally general.

Palpably the double enumeration enacted for "greater certainty" is a faulty construction, and it becomes necessary for us, to carry out the intention of the legislature, to find a *modus vivendi*. We are not to construe the statute so as to make our institutions impossible; we are not to lay down a rule which "followed up to its consequences would go "far to destroy that power (the provincial) in all cases," as Lord Selborne has said. (1 Cartwright 71.) This must be the language of every jurisconsult; and it is thus the great judges of the United States have dealt with their constitution. As an instance, in the case already cited of *Hylton* v. *The United States*, Chase, J., said: "The rule of apportionment (an express rule of the constitution) is only to be adopted in *such* cases where it can *reasonably* apply." I shall make four quotations from the case of

the *Citizens Insurance Company & Parsons* to show that the Privy Council has used the same freedom of interpretation, and has held that, in spite of the absolute form of sections 91 and 92, the courts will read them together, and modify one or the other or both, to meet the general requirements of the act, and to attain the ends parliament must be supposed to have had in view:—

"But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in section 91."

"Notwithstanding this endeavour to give pre-eminence to the Dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion government."

"It could not have been the intention that a conflict should exist, and, in order to prevent such a result, the language of the sections must be read together, and that of one interpreted. and where necessary modified by that of the other."

"It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the act must be looked at to ascertain whether language of a general nature must not, by necessary implication or reasonable intendment, be modified and limited." (1 Cartwright, 271-2-3-4.)

But it may be still further urged that the majority of the court is endeavoring to restrain the particular power of sub-section 3, section 91, by the general sub-section 16 of section 92. To this I answer, that it is not the generality of the terms in which a power is conveyed that decides as to its nature, so in *L'Union St. Jacques & Belisle* it was the general sub-section 16 of section 92 that qualified and restrained sub-section "21, Bankruptcy and insolvency," precisely as the court does in this instance. "Clearly this matter is private; clearly it is local, etc.," said Lord Selborne; and therefore it is a power given to the local legislatures. I need hardly add that the court does not contend that sub-section 16 could prevail if it were incompatible with sub-section 3. But this it cannot be, unless we hold that there cannot be double taxation, which is untenable, (*Bemis et al. & Board of Aldermen of*

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Boston, 14 Allen, 368). Besides, the power of double taxation is expressly recognized by the Act.

On the main question, as to whether there is any other power to tax except by way of license than that set forth in sub-sec. 2, the case of *Dow & Black*, L. R., 6 P. C. 272, seems to furnish direct authority. Sir James Colvile, in pronouncing the judgment of the Privy Council said :— "Their lordships are further of opinion with Mr. Justice "Fisher, the dissentient judge in the Supreme court, that "the Act in question, even if it did not fall within the 2nd "article (of sect. 92), would clearly be a law relating to a "matter of *a merely local or private nature* within the reading "of the 9th article of section 92, of the imperial statute." It is evident the learned judge meant the 16th article of section 92, for he had just declared that article 9 had "obviously no bearing on the present question." Again, the words "of a merely local or private nature," are not used in article 9, they are used in article 16 and in no other part of section 92. And lastly, if this is not enough, to agree with Mr. Justice Fisher, article 16 must have been intended, for that learned judge said: "It also "appears to me that the act 33 Vic., c. 47, comes within "the category of powers provided for in the 16th clause "of the 92nd section of the B. N. A. Act, 1867, being purely "a matter of a local nature." It seems to me then, that it is safe to say that *Dow & Black* lays down the principle as formally as it can be laid down (barring only the slip as to the number of the sub-section), that the sub-sections 2 and 9 do not exclude from the powers of the local legislatures the right to propose other forms of taxation.

The learned Chief Justice has referred to the case of *Dow & Black* as though it were an *obiter dictum*. It is true it was not necessary for their lordships to speak of this, but it was scarcely *obiter*, for it was before them, and it had formed a ground of dissent in the court below.

While the argument in this case was going on, we learned by telegraph that the Privy Council had confirmed the decision of the Supreme court in *The Attorney General & Reed*. I have not been enabled to see what their

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lordships said in that case, except through the medium of newspaper reports, from which I am not disposed to take the decision, inasmuch as it is usual for the Privy Council to submit a report in writing, which lays down precise propositions. And, in any case, the report, such as we have it, does not affect my opinion in this case. If the 10 cents tax was a tax at all, it was not direct taxation, within the meaning of the B. N. A. Act. In Mr. J. S. Mills' opinion, its character would only be determined with the end of the litigation, and when it was decided who should pay the costs of filing the exhibit. I am not, however, of the opinion that the *jus edicendi* which the Chief Justice of the Supreme Court seems to think is possessed by courts, can possibly go to the extent of compelling us to accept as an admitted truth the so-called science of political economy or the theories of Mr. Mill, and lest my indocility to accept such doctrines may appear presumptuous, I shall quote two paragraphs from Mr. Jevons, "Theory of Political Economy," one from the preface, the other the concluding sentence of the work, dealing with Mr. Mills' claims to be considered as the high priest and prophet of political economy, and with the so-called science as known:

"The contents of the following pages can hardly meet with ready acceptance among those who regard the science of political economy as having already acquired a nearly perfect form. I believe it is generally supposed that Adam Smith laid the foundations of this science; that Malthus, Anderson and Senior added important doctrines; that Ricardo systematised the whole; and finally, that Mr. J. S. Mill filled in the details and completely expounded this branch of knowledge. Mr. Mill appears to have had a similar notion; for he distinctly asserts that there was nothing in the laws of value which remained for himself or any future writer to clear up. Doubtless it is difficult to help feeling that opinions adopted and confirmed by such eminent men have much weight of probability in their favor. Yet, in the other sciences this weight of authority has not been allowed to restrict the free examination of new opinions and theories; and it has often been ultimately proved that authority was on the wrong side." (Theory of Political Economy. W. S Jevons, page v.)

"THE NOXIOUS INFLUENCE OF AUTHORITY.

"I have but a few words more to add. I have ventured in the preceding pages to call in question not a few of the favorite doctrines of econom-

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ists. To me it is far more pleasant to agree than to differ; but it is impossible that he who has any regard for truth can long avoid protesting against doctrines which seem to him erroneous. There is ever a tendency of a most hurtful kind to allow opinions to crystallise into creeds. Especially does this tendency manifest itself when some eminent author, with the power of clear and comprehensive exposition, becomes recognized as an authority on the subject. His works may possibly be far the best which are extant; they may combine more truth with less error than we can elsewhere find. But any man may err, and the best works should ever be open to criticism. If, instead of welcoming inquiry and criticism, the admirers of a great author accept his writings as authoritative, both in their excellences and defects, the most serious injury is done to truth. In matters of philosophy and science authority has ever been the great opponent of truth. A despotic claim is the triumph of error; in the republic of the sciences sedition and even anarchy are commendable." *Idem*, page 265.

In *The Attorney General & Reed* I do not learn from the report I have seen that the decision of the Privy Council in *Dow & Black* has been distinctly over-ruled. Until this is done in precise terms I shall continue to hold that the local legislatures may impose taxation by other modes than those set forth in sub-sections 2 and 9 sec. 92. In arriving at this conclusion I am satisfied to think that the most submissive case-lawyer could not confine himself more completely within his self-constituted prison than the majority of this court has confined itself within the bounds of precedent. Of course, I don't count the case of *Severn & The Queen*. If we were to be bound by it, nothing could be said on the right to tax indirectly; but it is only the decision of an intermediate Court of Appeal, and in a matter of this kind it cannot be considered conclusive. It is also pleasing to know that in a great part of the judgment there is unanimity in this court. We all reject the pretended scientific meaning of direct taxation, and this, I hope, will check the objectionable practice of reading books that are not authority in court. Where we differ is as to the nature of the tax and as to the power of the local legislature to collect indirect taxes. I have not alluded to the argument of the possible abuse of the taxing power. We constantly hear it said, if the local legislatures have all powers of taxation, they may destroy trade and commerce, and so forth. There is some truth

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in this. The folly of killing the hen that lays the golden eggs is not a new idea to the world. However, the presumption is that the institutions of government tend to enrich and not to empoverish the subject. Very extreme cases may come up, which, under the principles I have endeavored to explain, and which I understand to be those sanctioned by the Privy Council, will give rise to distinctions with which the courts will have to deal. But in any case, the simple abuse of the power to tax can always be checked by the power to disallow possessed by the federal authority.

We are to maintain the taxes in all the cases, and consequently the judgments in the five bank cases will be reversed, and in the four other cases the judgments will be confirmed.

BABY, J.:—

At this late hour of the day, within a few minutes of the time fixed for the adjournment, it would be an *hors d'œuvre* on my part to attempt giving my opinion at full length on the very important questions at issue, and which have been so thoroughly ventilated by my learned colleagues. It would almost suffice for me to say, that I share generally in the opinions so ably enunciated by my learned brothers, Justices Ramsay and Tessier.

Nevertheless, I may add that my judgment rests principally on two points which have been brought out most conspicuously in the course of the discussion:—

1st. That this is a direct tax.

2nd. That, whatever the name by which it may be called, direct or indirect, the Legislature of the Province of Quebec had the power of imposing it within the Province, for local purposes.

In the first place, I say that the tax complained of here is a direct tax, according to what is generally meant and understood in Canada by that term, and as I have always understood it when dealing with such a distinction in our system of taxation. I have not failed to make a careful examination of the numerous authorities quoted by coun-

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sel on both sides as to the classification into direct and indirect taxes. They all vary more or less, according to the country in which they were written, or the particular school of political economy their authors represent. It would be an unnecessary task for me to review them now; it would be merely going over much of the ground already traversed by the learned judges, and be a repetition which could not even have the pretext of throwing a spark of light on the subject, as all seem to concur in the inapplicability of the doctrines of political economists in dealing with the matter before us.

By the statute sought to be set aside as being *ultra vires*, the tax in question is imposed directly on the Banks and other institutions therein named carrying on business within the Province of Quebec. They are all incorporated bodies for the most part, holding their powers either under federal or local legislation. Considerable efforts have been made to establish indiscriminately that no corporation of this kind could be directly taxed in its person. Now, if an ordinary person can be so taxed, I fail to see why a corporation could not be taxed in the like manner, as, by our law, every corporation is a person (C.C. Art. 352).

It was argued in this respect that the tax in question might fall on foreigners or on capital owned totally or in part by persons residing out of the Province of Quebec and, therefore, it was not taxation "within the Province." This was followed up by another objection, viz,: that the impost complained of was put on a capital that might not be found within the limits of the Province, in other words, that a foreign Bank carrying on its operations in Quebec had, most likely, but a very small proportion of its capital engaged here, that it might, therefore, be taxed elsewhere, and the consequence would be that the same capital might be taxed several times over.

There is not much force, I think, in these two objections. In the first place, these corporations have their legal domicile within the Province, and from the moment they have taken it up, they become undoubtedly amenable to its laws; and, in the second place, wherever a

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Bank or like institution opens business, it must be readily admitted that it does so in its corporate name and as a whole; it is the corporation that acts and not a certain number of shareholders or a proportion of them, according to the amount of capital invested.

On the second point, I say that, even should this tax be not a direct one, the Legislature of Quebec had the right of imposing it in the exercise of one of its inherent powers. A people can undoubtedly tax itself through its legislators in Parliament assembled. Now, by the British N. A. Act, 1867, the several Provinces forming "The Dominion of Canada," at their own request, have been granted respectively a legislature with certain enumerated powers. The general powers of taxation cannot be impliedly taken away from them. It requires an express and clear enactment of the law to deprive them of what is a primary right. There is nothing of the kind, however, in the Act, which should be liberally interpreted, that is to say, in the same sense and spirit as it was framed and granted to us by the Imperial Parliament. Doing otherwise, would be taking to pieces and breaking up this great treaty, made and entered into between the various British N. A. Provinces, under the sanction and for the welfare of the Empire.

I am of opinion that the local legislatures alone and exclusively have the right of imposing direct imposts within their respective provinces, to raise a revenue for provincial purposes, but this right given by the 92nd clause of the British N. A. Act, 1867, does not imply an abandonment by them of all other rights of taxation, or a prohibition to them to levy money by any other mode or system of taxation within the province and for provincial ends. In other words, I read clauses 91 and 92 of said Act—which have certainly to be reconciled—as giving to the Dominion or federal legislature the power of raising money by any mode or system of taxation, except provincial taxation for provincial objects, which is the right reserved to and conferred specially and exclusively on the local legislatures, but, at the same time, not depriving in any way the

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latter from exercising the right of taxing generally, for the objects for which they were created, and which has not been taken away from them expressly or impliedly.

I am aware that this interpretation of the Statute has not been accepted in certain quarters, but I cannot see—to be practical—how any other can be given.

It has also been stated that this is an excise tax and, therefore, did not fall within the jurisdiction of the local legislature. I fail to see how it can be construed into such a tax. By excise, is generally understood the impost put on the home products manufactured or otherwise. The taxes put on spirits, tobacco, malt, flour, coal, have always been considered as excise duties in Canada and no other kind of tax. The very name signifies this. There is no parity here.

We have it said this tax is inopportune, unreasonable, unjust. Whether it be so or the reverse is not for this Court to decide—that is the political side of the question and not the legal. The tax may be perfectly legal on the one hand, and quite inopportune on the other. It rests then with the people to decide, by their representatives in Parliament, whether it should be abrogated or not. I hold, moreover, that it does not fall within our domain to set aside a tax imposed by a proper authority because the same may happen to clash—some day or other—with the powers of taxation appertaining to another branch of our political organization.

On the whole, I am for confirming the judgments which maintain the taxes and to reverse those which set them aside.

The following are the *considérants* applicable to each of the nine cases:—

"The Court, etc.....

"Considering that the taxes complained of in this cause were and are imposed by a statute of the Legislature of the Province of Quebec, passed in the 45th year of Her Majesty's reign, and being numbered Chapter 22 of the Statutes of the said year;

"And considering that the said legislature had power

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to impose the said duties, inasmuch as the said taxes are direct taxes within the Province, and were imposed in order to raise a revenue for provincial purposes;

"And considering furthermore, that even assuming the said taxes should be considered as not falling within the denomination of direct taxes, the said legislature had power to impose the same, inasmuch as the said taxes were matters of a merely local or private nature in the Province."

Judgment reversed in the five appeals by the License Inspector, and confirmed in the four appeals by corporations.

Lacoste, Globensky, Bisaillon & Brosseau, Attorneys for Lambe *es qual.* in all the cases.

Kerr, Carter & Goldstein, Attorneys for the N. B. & Mercantile Insurance Co., and the Export Lumber Co.

Abbott, Tait & Abbotts, Attorneys for the Ontario Bank, Merchants Bank, and Molsons Bank.

Maclaren, Leet & Smith, Attorneys for the Canadian Bank of Commerce.

Archibald & McCormick, Attorneys for the Williams Manufacturing Co.

Greenshields, McCorkill & Guerin, Attorneys for the Ogdensburg Coal & Towing Co.

(J. K.)

Nov. 26, 1884.

Coram MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

LA CORPORATION DE LA PAROISSE DE STE-ANNE DU BOUT DE L'ISLE
(*Defendant below*),
APPELLANT;

AND

W. A. REBURN
(*Plaintiff below*),
RESPONDENT.

Servitude—Water-course—Procès-verbal.

Although it is within the attributes of municipalities to make by-laws and *procès-verbaux* for the opening of water-courses, and a person injured thereby may have exercised his right of appeal to the county council, and the *procès-verbal* has been confirmed by the county council, nevertheless such confirmation is not a bar to an action to set aside the *procès-verbal* where it orders something to be done which is in itself contrary to law. And so, where the effect of a water-course established by *procès-verbal* was to aggravate greatly the servitude which the plaintiff's land had to bear owing to its being lower than that of his neighbours, it was held, that he was entitled to bring suit to have the *procès-verbal* set aside, although he had appealed previously to the county council and the *procès-verbal* had been confirmed thereby.

The following was the text of the judgment appealed from (Superior Court, Montreal, PAPINEAU, J., Dec. 31, 1881):—

" La cour, etc.

" Considérant qu'il est prouvé que le procès-verbal de cours d'eau, en date du 21 juillet 1875, homologué par le conseil municipal de la Paroisse de Ste-Anne du Bout de l'Isle, et subséquemment amendé par une résolution du dit conseil, en date du 26 décembre 1878, n'a jamais été demandé par le demandeur dont le fonds de terre est d'un niveau inférieure à celui des fonds des nommés Isidore Pilon et Jean-Baptiste Vinette dit Larente, qui seuls ont demandé le dit procès-verbal, et que le cours d'eau ordonné par ce procès-verbal ne peut pas servir à égouter les parties basses de la terre du demandeur;

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" Considérant qu'en vertu du dit procès-verbal, une partie de l'eau des terres des dits Pilon et Vinette, et même de celle de la terre du nommé Sauvé, le troisième voisin du demandeur, est amenée, par travaux de main d'homme, et se déverse sur la terre du demandeur en plus grande quantité qu'elle n'y viendrait sans les travaux ordonnés par le dit procès-verbal ;

" Considérant qu'il est écrit en toutes lettres dans le dit procès-verbal : ' que les dits cours d'eau désignés aux arti-'cles second et troisième (du dit procès-verbal) seront faits, 'entretenus par moitié par les dits Jean-Baptiste Vinette dit 'Larente et Isidore Pilon, qui ont demandé acte au sous-'signé (surintendant nommé par le conseil ès dite qualité 'pour *s'exempter* respectivement des travaux qu'il leur fau-'drait faire *pour ouvrir un fossé mitoyen dans la ligne qui sépare 'leurs dites terres et qui serait loin d'être impossible à faire ;*'

" Considérant qu'il n'a été prouvé aucun titre donnant aux propriétaires des terres possédées par les dits Pilon, Vinette et Sauvé, droit de faire déverser de leur terre une plus grande quantité d'eau que celle qui en découlait naturellement sur celle du demandeur, sans que la main de l'homme y eut contribué, et que sans un tel titre, le conseil municipal de la défenderesse n'avait pas le pouvoir d'agraver, au moins sans indemnité préalable, la servitude du fonds du demandeur ;

" Considérant qu'il est prouvé qu'il y avait, sur la terre du dit Pilon une élévation de terrain qui empêchait une partie de l'eau de sa terre ainsi que l'eau de la terre de Vinette et de celle de Sauvé, de couler, naturellement, sur la terre du demandeur, et que, par l'effet du dit procès-verbal, la dite élévation du terrain a été coupée de manière à conduire sur la terre du demandeur l'eau d'une portion des dites terres qui n'y venait pas auparavant ;

" Considérant que l'amendement du 26 de décembre 1878, au dit procès-verbal a été fait sans avis donné aux intéressés, suivant l'article 810 du code municipal, du lieu et du temps auxquels devait commencer l'examen du procès-verbal, et que les intéressés n'ont pas été mis en demeure de faire valoir leurs droits et prétentions contre cet amendement ;

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" Considérant que le Conseil municipal de la défenderesse a excédé ses pouvoirs en ordonnant le dit procès-verbal et son amendement sous les circonstances prouvées dans la cause ;

" Considérant cependant que le *quantum* des dommages soufferts par le demandeur n'a pas été déterminé par la preuve ;

" Considérant que la défenderesse n'a pas prouvé les allégations essentielles au soutien de sa défense, la Cour renvoie celle-ci et annule le dit procès-verbal en autant que le demandeur y est concerné, avec dépens contre la défenderesse distraits à Maîtres R. et L. Laflamme, avocats du demandeur."

H. C. St. Pierre, for the appellant :—

Le premier point soulevé par la défenderesse est celui-ci : Le demandeur se plaint de l'homologation d'un procès-verbal de cours d'eau par le conseil local de la municipalité de Ste. Anne. La preuve fait voir qu'il s'est prévalu des dispositions du code municipal qui lui permettait de porter sa cause en appel devant le conseil de comté (voir les articles 925, 1061.)

Le Conseil de Comté siégeant comme tribunal d'appel a confirmé l'homologation du procès-verbal en question. Bien plus, le demandeur en a appelé à la Cour de Circuit, de la décision du Conseil de Comté et son appel a été de nouveau débouté.

La construction ou l'ouverture d'un cours d'eau, dans une municipalité rurale, est incontestablement une chose qui, de sa nature, tombe sous la juridiction du conseil municipal où se trouve ce cours d'eau. De plus, dans le cas présent le demandeur intimé a formellement accepté et admis la juridiction du conseil, en plaidant devant lui et en portant sa cause en appel devant le conseil de comté et devant la Cour de Circuit.

Nous affirmons 2o. que ce cours d'eau intéresse quatre contribuables en y incluant le demandeur intimé, et que ce dernier doit être tenu comme les trois autres de la manière indiquée dans le procès-verbal en vertu des articles 870, 872, 868, 884, 887 et 858.

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Maintenant se présente une troisième question. Etant établi que le conseil avait juridiction, est-ce le conseil ou la Cour Supérieure qui doit être juge et de l'opportunité d'ouvrir un cours d'eau et de l'endroit où il doit être localisé et de la manière de le construire? Nous concluons que c'est le conseil qui est le seul juge et de l'opportunité et de la manière de faire le cours d'eau en question, et que les arguments *ab inconvenienti* que l'on cherche à faire valoir maintenant ne peuvent pas donner à la Cour Supérieure une juridiction d'appel que la loi lui a formellement enlevée en déclarant que cet appel serait pris devant le conseil de Comté dont la décision sera finale.

Hon. R. Laflamme, Q. C., for the respondent :—

Pour déterminer exactement les droits des propriétaires et les limites de l'autorité municipale en matière de cours d'eau, en autant que ces pouvoirs et ces obligations peuvent excéder les devoirs que le droit commun impose comme servitudes, relativement à l'écoulement des eaux, il est nécessaire de considérer les dispositions du Code municipal, qui sont contenues dans le titre 6. L'article 867 de ce titre déclare :—"Tous les cours d'eau servant à " égouter plusieurs terrains, *excepté les fossés de ligne* qui " n'égoutent que les deux terrains entre lesquels ils sont " situés et les fossés de chemins, sont régis d'après les dis- " positions de ce titre."

Cet article excepte de la juridiction municipale les fossés de lignes qui n'égoutent que les deux terrains entre lesquels ils sont situés.

Les municipalités n'ont en conséquence aucune autorité de statuer, par voie de règlements ou procès-verbaux, au sujet de tels fossés, et les dispositions du Code municipal ne s'appliquent que lorsqu'il s'agit d'établir un cours d'eau pour égouter plusieurs terrains, et l'article 475 explique encore plus clairement les limites des pouvoirs des municipalités sur ce sujet. Cet article se lit comme suit :

" Ordonner et régler la construction, l'ouverture, l'élar- " gissement, l'approfondissement, le changement, la répa- " ration ou l'entretien, aux dépens de la corporation, de " tous fossés, cours d'eau, canaux, souterrains, chaussés et

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" clôture, dans l'intérêt *des habitants de la municipalité ou* " *d'une partie notable* d'entre eux.

" Tout règlement fait en vertu de cet article, au sujet " d'un cours d'eau régi par un acte d'accord ou un procès- " verbal, a l'effet de subroger la corporation aux personnes " tenues aux travaux de ce cours d'eau relativement à " l'obligation de faire ces travaux."

En disant que la municipalité pourra ordonner et régler les cours d'eau faits dans l'intérêt *des habitants de la municipalité, ou d'une partie notable d'entre eux*, il est évident que la loi n'a pas voulu faire servir l'autorité municipale pour des objets privés ou individuels. Autrement, on violerait les droits des propriétaires, protégés par la loi;

Notre Code civil, article 501, dit: " Les fonds inférieurs " sont assujettis envers ceux qui sont plus élevés, à rece- " voir les eaux qui en découlent naturellement sans que " la main de l'homme y ait contribué. Le propriétaire " inférieur ne peut pas élever de digues qui empêchent " cet écoulement; le propriétaire supérieur ne peut rien " faire qui aggrave la servitude du fond inférieur."

Demolombe, Servitudes, Vol. 1, No. 35: " Quant au " propriétaire supérieur, l'article 640 dispose qu'il ne peut " rien faire qui aggrave la servitude du fond inférieur.

" Ainsi, d'abord, il est évident qu'il ne peut changer la " direction naturelle des eaux ni leur imprimer un cours " différent de celui qui résulte de la situation même des " fonds."

No. 36. " Le propriétaire supérieur ne peut, disons-nous, " rien faire qui aggrave l'assujettissement du fond infé- " rieur: soit en imprimant aux eaux un courant plus " rapide; soit en les faisant retomber de plus haut, après " les avoir comprimées pour les élever; soit en réunissant " sur un seul point les eaux qui se seraient répandues sur " toute la surface du sol: *si forte aquam aut majorem fecerit,* " *aut citatiorem, aut vehementiorem, aut si comprimendo redun-* " *dare effecit* (L. 1, § 1, ff. *de aqua et aquæ;* ajout. Cass. 15 " mars 1830, Jousse, Sirey, 1830, I, 271).

La cour remarquera que la requête, pour obtenir l'établissement de ce cours d'eau, n'a été faite que par deux

individus, et qu'il n'y a réellement d'intéressé que le voisin immédiat du demandeur, Isidore Pilon. Le cours d'eau en question, suit absolument la ligne de division entre lui et le demandeur intimé.

Ces travaux n'étaient demandés que par deux individus, Pilon et Larante. Le premier étant le voisin immédiat de l'intimé, et voulant s'exempter des travaux que ce dernier pouvait exiger de lui pour faire un fossé mitoyen dans leur ligne de division, s'adjoint son voisin de l'autre côté, pour s'exempter également de l'obligation de faire un fossé mitoyen entre eux deux en amenant leurs eaux sur la propriété de l'intimé, qui autrement s'écouleraient naturellement sur leurs propriétés respectives.

Le procès-verbal constate ceci d'une manière formelle.

L'article dix dit:

" Les dits cours d'eau désignés aux articles second et " troisième seront faits et entretenus par moitié, par les " dits Jean-Baptiste Vinette dit Larante et Isidore Pilon " qui ont demandé acte au soussigné ès dite qualité pour " s'exempter respectivement des travaux qu'il leur faudrait " faire pour ouvrir un fossé mitoyen dans la ligne qui " sépare leurs dites terres et qui serait loin d'être impos- " sible à faire."

Il est donc établi par le surintendant, sur la déclaration expresse des requérants, que leur seul objet en demandant ce cours d'eau était d'amener les eaux qu'ils devaient écouler par des fossés mitoyens faciles à faire, sur la propriété du demandeur et d'échapper à une obligation ordinaire et légale en l'imposant à l'intimé.

Ces deux individus, en outre, demandaient par leur requête de régler les travaux de trois fossés mitoyens: celui entre Joseph Sauvé et Jean-Baptiste Vinette dit Larante, entre ce dernier et Isidore Pilon, et entre ce dernier et l'intimé Reburn, pour les relier en passant sur la propriété de ce dernier avec un cours d'eau déjà verbalisé, au delà du fossé du Grand Tronc, et ils demandent ceci au désir de l'article 884 du Code municipal.

Or cet article ne s'applique qu'à un cours d'eau déjà établi par un procès-verbal, ou à un cours d'eau ordonné

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dans les circonstances prévues par le Code et seulement lorsqu'il s'agit de déterminer les travaux à exécuter ou à le faire fermer.

Art. 884. "Tout conseil municipal sur résolution à cet "effet ou sur la requête d'une ou de plusieurs personnes "intéressées à l'ouverture, la fermeture, la division, la "construction ou l'entretien *d'un cours d'eau qui est ou doit "être sous sa direction*, demandant à régler et déterminer "les travaux à exécuter sur ce cours d'eau ou à le faire "fermer doit sans délai: 1o. Convoquer, à une de ses "séances par avis public, les contribuables intéressés dans "l'ouvrage projeté..... 2o. Nommer un surintendant "spécial chargé de visiter les lieux mentionnés dans la "résolution ou la requête et faire rapport ....."

Cet article ne peut certainement pas s'interpréter de manière à conférer aux conseils municipaux, le droit d'imposer à un individu, des obligations spéciales que la loi et le Code municipal mettent à la charge de ses voisins, en affranchissant ceux-ci de leurs servitudes légales, et en aggravant la position du propriétaire particulier et en lui causant des dommages considérables.

RAMSAY, J. (*diss.*):—

I am of opinion that the judgment of the court below should be reversed.

The judge in the court below seems to have been under the impression that the water-course had been made across Reburn's land to avoid making it in the line between Pilon and Larente's land. But there was no obligation to carry away the water of the upper part of a land by its line drain. The obligation is to suffer the water to be drained off at the lowest level, and keeping this in view the council has a right to locate a water-course in such a way as not to aggravate the servitude. In this case there is no question of an aggravation of the servitude to which respondent's land is subject. His pretentions are contradicted by the surveys, and so far as I can understand the evidence, the water-course seems to be made in the most advantageous manner for the respondent; and in addition to this he has been assessed so as to leave him not the smallest room for complaint.

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TESSIER, J. :—

L'intimé Reburn a été attaqué par ses trois voisins qui voulaient changer un cours d'eau naturel passant sur sa terre. Pour obtenir ce résultat, ces derniers se sont adressé au conseil municipal, qui, sur leur demande, a fait verbaliser le cours d'eau et l'a changé de manière à faire couler une plus grande quantité d'eau sur la terre de Reburn, et à l'inonder en partie. Malgré la résistance de Reburn, qui en a appelé d'abord au conseil municipal et ensuite à la Cour de Circuit, le *procès-verbal* a été confirmé et homologué.

Là dessus Reburn a intenté la présente action dans la Cour Supérieure pour faire annuler ce *procès-verbal*, et son action a été maintenue pour le motif que le conseil municipal n'avait pas de juridiction pour ordonner le changement d'un cours d'eau. C'est là, me paraît-il, la question que nous avons à décider dans cette cause. Le conseil municipal a-t-il le droit de détourner un cours d'eau naturel ? Peut-être aurait-il ce droit en indemnisant le propriétaire du terrain traversé par le cours d'eau ; mais il me paraît certain que le conseil ne peut pas le faire sans offrir une indemnité. Les articles 501, 502 et 503 de notre Code Civil contiennent notre droit sur cette matière. Ces articles ne font que déterminer les droits respectifs des particuliers dont les propriétés sont traversées par des cours d'eau naturels, et leur permettent de s'en servir à la charge de rendre l'eau, à la sortie du fonds, à son cours ordinaire. Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur. Ces principes généraux ont été plusieurs fois appliqués et illustrés par les décisions de nos cours, et l'on peut consulter là-dessus les arrêts cités dans le Code Annoté de M. de Bellefeuille sous l'article 503. Je ne pense pas que le conseil municipal puisse enfreindre ces principes fondamentaux. Le conseil peut, il est vrai, redresser ou régulariser un cours d'eau, mais pas le détourner et le changer tout à fait. Il est bien constaté par la preuve et par le procès-verbal cité dans le jugement de Son Honneur M. le Juge Papineau, que les voisins de Reburn ont présenté

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leur requête au conseil dans le but de se débarrasser de l'eau qui se trouvait sur leur terrain et de la jeter sur celui de Reburn. Il y a dans ce procès-verbal non seulement des irrégularités mais une injustice considérable, et pour toutes ces raisons je suis d'opinion de confirmer le jugement qui l'a mis de côté.

CROSS, J.: —

Pilon and Reburn own neighbouring farms running parallel from south to north where they strike the line of the Grand Trunk Railway not exactly at right angles, the line of the railway trending slightly northward as it passes from west to east adjoining the north end of the farms. Larente is Pilon's neighbour to the south and Meloche Reburn's neighbour to the north. The general incline of the land is towards the railway, although it is not uniformly so. At a considerable distance, probably over 400 yards from the railway, there is a depression and an ancient somewhat imperfect ditch running across the farms parallel or nearly so to the Grand Trunk Railway. This ditch seems to have crossed the farms of Reburn, Pilon and Larente, having its origin in the last mentioned land with probably a slight accession from the land of Sauvé, a neighbour still further south. The level of Reburn's land being the lowest it naturally received water from his neighbours to the south, but this ancient ditch or water course brought no great flow of it, and it was probably dried up reasonably early in spring. What water crossed Reburn's land by this depression or ditch would pass down Reburn's eastern line and find exit by a discharge which had its exit eastward from his line at some distance from the line of the railway. Reburn had made some progress towards filling up this declivity in his land and objected to Pilon's water continuing to flow on his, Reburn's, land through this depression. Pilon and his neighbour Larente thereupon joined in a petition to the Parish Council to have a water course verbalised to carry off the water coming through this depression. The Council appointed Mr. Brunet Notary as special superintendent, who visited

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the locality and reported in favor of opening a water course of a suitable depth. It was to be made deep enough to drain Reburn's land, but not to a depth below the water course already verbalized across the farms through the depression in question until it reached Reburn's southern line, when in place of continuing across his land it was to follow the line between him and Pilon until it encountered the railway ditch along which it was to pass eastward to Reburn's northern line, then southward on the line between him and Meloche until it found exit by the water course already verbalized, into which Reburn's water coming from the south had its exit. Two considerable affluents from the south were at the same time verbalized to fall into and to form part of the water course in question. The work of opening this water course was distributed, a moderate proportion being imposed upon Reburn. This *procès verbal*, with a not very material amendment, was homologated notwithstanding a strenuous opposition by Reburn who appealed to the County Council and then to the Circuit Court without success. The water course so verbalized was at least for the most part constructed, and had the effect of flooding Reburn's land to a considerable extent in one field and to a less extent in another locality.

Reburn thereupon brought the present action against the parish municipality, complaining that on account of the levels the *procès verbal* in question could not be executed, that it flooded his fields, greatly augmented the flow of water upon his lands, and aggravated to a serious extent the natural servitude to which his land was liable. He therefore claimed that it should be set aside, and that damages should be awarded to him for the injury he had sustained in the flooding of his fields.

The municipality met the action by a plea that the *procès verbal* had been made in conformity to the requirements of the law and had been confirmed, notwithstanding Reburn's appeal to the County Council and to the Circuit Court; that the water course was of public benefit and the municipality were bound to have it opened for

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the benefit of those concerned, and had acted within the limits of their jurisdiction, and had caused Reburn no damage; that if water remained on his property he had himself to blame, as he could force the railway to make their ditches sufficient to carry it off, and they, the municipality, could not, but they had notified the railway to make the necessary work.

It appears by the proof that the railway authorities objected to the *procès verbal* and maintained that any work done by them would be useless, the execution of the *procès verbal* to be effective, being impossible on account of the levels. Two of their engineers were examined and gave their opinion to this effect. Plans were also produced with profiles of the comparative levels of different parts of the ground, among others one showing the grade on the line between Pilon and Reburn from the entrance of the water course until it met the Grand Trunk Railway at the northwestern angle of Reburn's farm. This plan showed that the land rose from the entrance of the ditch for some distance, then gradually declined to a very depressed level, when it again gradually rose until it reached the railway ditch at the northwest angle of Reburn's farm, so that a ditch of considerable depth at both ends of this grade would be insufficient to prevent the water overflowing into Reburn's field at the centre of this space.

The corporation, among other evidence, produced an elaborate plan of Reburn's land, showing the water course with carefully prepared levels taken at various points following the water course along Pilon's line, through the Grand Trunk ditch to the northeast angle of Reburn's farm, where it was presumed to join a water course running southward between Reburn and Meloche, until it found an exit through a discharge at a moderate distance from the railway running northwards across the Meloche farm. By these levels it would appear that there was sufficient declivity down the Reburn and Pilon line to carry water from the entrance of the discharge on the Reburn farm to the Grand Trunk Railway

ditch at the northwest angle, but the surface levels at the depressed locality were probably taken on the top of the embankment thrown up in making the ditch, and the ground further east was depressed below the level of the ditch in this locality, so that the water in the spring freshets flowed over the embankment and flooded Reburn's land to a considerable extent in this locality. The levels in the Grand Trunk ditch were lower throughout than where the water course discharged into it; the surface of the land was slightly more depressed at the northwest angle than at the northeast angle, but was more depressed at the centre between these two points, and to such an extent that here in spring freshets there was an overflow on to Reburn's land. The bottom of the ditch leading from the northeast angle up Meloche's line was only verified at the point of immediate exit from the Grand Trunk Railway ditch. At the point so verified it showed a level a few *centimes* of a foot lower than the lowest level of Reburn's land opposite the depression occurring in Reburn's western line between him and Meloche.

The Superior Court by its judgment annulled the *procès verbal*, but refused Reburn any damages on the ground that he had not adduced proof of any specific amount.

Reburn inscribed the case in Review, but the court there confirmed the judgment of the Superior Court.

The municipality now appeal from the judgment of the Superior Court setting aside the by-law.

One of the *considérants* of the judgment was a quotation from Mr. Brunet, the superintendent's, *procès verbal* which stated that the *cours d'eau* in the second and third articles of the *procès verbal*, viz., the affluents above mentioned, were to be made by Larente and Pilon who had asked them in order to exempt themselves respectively from the work of making a line ditch between their lands, which was far from being impossible to make.

It may be remarked that the water course in question was not asked for by any notable part of the inhabitants

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of the parish, and would appear to have been rather an expedient to avoid the necessity of making line ditches than a matter of any general public utility, or of utility to any considerable number.

A difficulty I have experienced in this case is from the fact of its being within the attributes of the municipalities to make by-laws for the opening of water courses, and the complainant in this case having exercised his right of appeal. Should not the result be considered final and conclusive as regards him? The court have concluded that it should not be so in a case like the present. It is true that the parties may be concluded as to anything that arises as to the regularity of the making of the *procès verbal*, but if the municipality have made a *procès verbal* to do something which is in itself contrary to law, a party injured must have a legal remedy to set it aside.

In this case it is manifest that the carrying out of the *procès verbal* would greatly aggravate the servitude which Reburn's land would have to bear by his land being lower than that of his neighbours. It would oblige him to receive a largely augmented flow of water to which he was not previously liable, a great part of which, at least, should be carried off by a line ditch between his two neighbours to the south, and would, as will be seen by further examination, flood and deteriorate a considerable portion of his land without the possibility of a discharge from that water. It will be observed that Mr. Beaudry's figures show the level of some parts of the surface of Reburn's land opposite the water course in its approach to the northwest angle of his farm to be below the level of the bottom of the water course at that locality, consequently so long as water flows in the course there, Reburn's adjoining field will be inundated to a level corresponding with the surface of the water in the water course there, and although the level of the bottom of the discharge from the ditch of the Grand Trunk at the northeast angle may be a few *centimes* of a foot below the level in the depressed part of Reburn's land, yet the

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distance between the two points is too considerable to make the small difference in the level operate as an effective drainage. On the contrary it is manifestly insufficient, because to drain this low part of Reburn's field it would be necessary to cut at least a shallow drain, the bottom of which must be below the level of the bottom of the ditch at the northeast angle as indicated by Mr. Beaudry. Again Mr. Beaudry has not verified the level save at the immediate exit of this ditch, without following it up to the point where it should have exit by the discharge running eastward, and although he says he saw the water running in that direction, this was probably back water from ice obstruction or overflow of the Grand Trunk ditches in early spring. It would seem extraordinary although not impossible that this discharge should serve to carry off the water coming down Meloche's line from the south and serve the same purpose for the water coming up as it were from the north. This point might be lower than the land as well to the north as to the south, but there is no explanation of it and it is a singular circumstance that Mr. Beaudry should have failed to verify the level here. It was correctly observed that the greater depth of the Grand Trunk ditch would make nothing for or against Reburn's case, because if the levels admitted of the water coming to Reburn being discharged through the exit ditch at the northeast angle, the greater depth in the Grand Trunk ditch would but retain a quantity of water at a lower level, that although not carried off could not return upon Reburn's land. The overflow at the centre point of the Grand Trunk ditch could not be complained of by Reburn after the water fell to a level below the bottom of the ditch at the northeast angle, but up to that point, Reburn had reason also to complain of that overflow. On the whole it is apparent that the execution of the *procès verbal* in question must operate a serious detriment to Reburn by aggravating his position, and that the remedy awarded him by the judgment of the Superior Court is just and justified by law. This Court therefore confirms that judgment.

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Judgment confirmed, RAMSAY, J., *diss.*

Saint-Pierre & Scallon for the appellant.

Laflamme, Huntington, Laflamme & Richard for the respondent.

(J. K.)

Dec. 9, 1884.

Coram DORION, C.J., MONK, RAMSAY, TESSIER and CROSS, JJ.

JOHN BLACK ET AL.
(*Defts. in the Court below,*)
APPELLANTS;

AND

ALEXANDER WALKER,
(*Plff. in the Court below*),
RESPONDENT.

Simulated deed—Action of third party.

Real estate estimated to be worth about $1200 was sold to a person without means, for a consideration stated in the deed to be $3,650. No money was paid, and the vendors remained in possession. The vendee executed a deed of obligation and hypothec in favor of the vendors for the unpaid instalments. Two of these instalments, amounting to $2,000, were subsequently transferred by the vendors to W. in payment of goods.

HELD:—That the sale of the property and the obligation and hypothec in favor of the vendors being simulated and fraudulent, W. was entitled to have the deed of obligation and hypothec from the vendee to the vendors set aside as regards him (the vendee being a party to the suit), and to ask that the vendors be condemned to pay for the goods as his personal debtors.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.) in favor of the respondent. See 5 Legal News, p. 415, where the judgment of the lower Court is reported.

The following was the text of the judgment appealed from :—

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" The court, etc.

" Considering that plaintiff, in May, 1879, sold and delivered to the defendants John Black and Henderson Black, at Montreal, goods to the amount of and of the value of $1998.05 currency, and in payment thereof did transfer to plaintiff accepting thereof a sum of $2,000 due to them by Théodore Roy under an obligation, of date 15th April, 1879, for $3,000 ;

" Considering that the consideration of said obligation was a sale by John Black and Henderson Black to said Théodore Roy of land in the City of Montreal, for the nominal consideration of $3,650, under deed of date 16th April 1879 ;

" Considering that the real value of said land was much under $2,000, and said Théodore Roy was a man without means and insolvent to the knowledge of said John Black and Henderson Black;

" Considering that said Théodore Roy never paid any money for said deed to him, never entered into possession, but the said John Black and Henderson Black continued to deal with the said property as their own after the date of the deed to said Théodore Roy ;

" Seeing that the deed of sale of date 16th of April, 1879, from the said John Black and Henderson Black to said Théodore Roy, and the obligation from said Théodore Roy to said John Black and Henderson Black, were simulated and fraudulent ;

" Doth declare that the deed of obligation and *hypothèque* from the defendant Théodore Roy in favor of the defendants John Black and Henderson Black, executed at Montreal, before Perrault, notary, on the 15th day of April, 1879, was and is fraudulent and simulated, and doth set aside the same as regards the plaintiff: doth further declare that the said defendant Théodore Roy in granting the said obligation and *hypothèque* and in accepting notice of the transfer of a part thereof to plaintiff, acted simply as the agent and *prête-nom* and for and on behalf of the defendants John Black and Henderson Black; and doth condemn the defendants John Black and Henderson Black

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jointly and severally to pay and satisfy to the plaintiff the said sum of $1,998.05, with interest from the 18th day of May, 1881, day of service of process, and costs of suit, distraits," etc.

The facts are fully stated in the opinions of the judges in appeal. It may be remarked, however, that the condemnation in the judgment cited above follows the conclusions of the declaration.

C. A. Geoffrion, Q.C., for the appellants.

L. N. Benjamin, for the respondent.

CROSS, J. (*dissentiens*):—

Walker, a wholesale merchant at Montreal, sued the firm of J. & H. Black, dealers at St. Johns, and Théodore Roy, a trader in Montreal, representing that he, Walker, had been in the habit for several years of selling goods to J. & H. Black in exchange for properties and had confidence in them; that in May 1879, they proposed to buy goods from him to the amount of $3,000, representing to him that they were owners of a hypothec of $3,000 given to them by Roy, payable by yearly instalments of $1,000 each as the balance of the price of real estate on which Roy had paid $300; that Roy was a man of means and had other properties; that relying upon these representations he sold them goods to the amount of $1,998.05 and accepted in payment a transfer of the two first instalments of said hypothec or obligation, the same being transferred to him by deed before Marler, notary, of date the 5th of May, 1879, said obligation being dated the 15th April, 1879; that Roy was a stranger to Walker, was not present at the execution of the transfer, but was afterwards brought by J. & H. Black to accept it in Walker's absence. That Roy was simply a *prête-nom* of J. & H. Black and in the sale of the property mentioned in the hypothec from J. & H. Black to Roy, executed before Simard, notary, on the 16th April, 1879, Roy was falsely and fraudulently represented to have paid the sum of $3,300 in cash for the property, and when the goods were purchased and the transfer made, it was by J. & H. Black represented that

Roy had paid $300 on account, whereas he had never paid any money whatever on account and the property had always remained in the possession of J. & H. Black who leased it and collected the revenues. The sale was false and simulated and made for the purpose of enabling J. & H. Black to dispose of the obligation and to deceive under pretence that the property had been sold, they knowing that Roy had no means, and to defraud Walker had, on the day before the execution of the sale, caused Roy to execute the obligation whereof part had been so transferred to Walker, and immediately after the transfer Roy had left Canada. That J. & H. Black had also caused a fictitious price to be inserted in the deed whereby they had acquired the property from one Proulx.

By reason of which allegations Walker drew the inference that he had a right to recover from J. & H. Black the value of the goods he had sold them.

By a second count Walker claimed that he was entitled to claim from J. & H. Black, the two first instalments of the obligation transferred to him, on the ground that Roy was a *prête-nom* and as such the mere agent of J. & H. Black.

By a third count it was claimed that the sale from J. & H. Black to Roy, and the obligation and hypothec from the latter to the former, were a concerted fraud concocted between J. & H. Black and Roy to deceive and defraud the public and whoever they might be able to impose upon; that no money or value ever passed from the one to the other, and J. & H. Black remained in possession of the property and collected the revenues. That at the date of the obligation and at the date of its transfer J. & H. Black promised and agreed to pay the amount of the two first instalments and to hold Roy free and harmless therefrom. Whence Walker inferred that he had a right to have it declared that Roy was a *prête-nom* and that the debt pretended to be due by him was really due by J. & H. Black.

The declaration contained a further count in *assumpsit* for goods sold and delivered &c. to the amount of

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$2,000, and concluded that the obligation and hypothec from Roy to J. & H. Black should be declared fraudulent and simulated and should be set aside as regards him, Walker; that Roy, in granting the obligation and accepting notice of the transfer, acted as agent and *prête-nom* for J. & H. Black, against whom a joint and several condemnation was asked for $2,000.

Walker produced an account of the goods he had sold. 2nd. The deed of sale from J. & H. Black to Roy, which it is to be observed was made with promise "de garantir "de tous troubles et empêchements généralement quel- "conques," rendering the vendors responsible for all prior incumbrances.

3rd. The obligation and hypothec from Roy to J. & H. Black.

4th. The transfer from J. & H. Black to Walker made with legal warranty and granting priority to Walker for the $2,000 over the remainder coming to J. & H. Black.

Roy appeared but did not plead. J. & H. Black, the now appellants, pleaded to the effect that before the acceptance of the bargain, Walker had made enquiries as to the value of the hypothec and declared himself satisfied; that they had made no false representations or any other representations than those contained in the transfer, which were true; that Roy was not a *prête-nom*, nor were said deeds fictitious.

From the representation so made of his case by Walker, if he really showed any grievance, the remedy, if any, applicable, would have been the annulling of the bargain between him and J. & H. Black, in so far as to set aside the transfer and leave Walker free to obtain judgment for the value of the goods sold by him; but for this purpose he would have required to abandon the values transferred to him, as he could not both have the value of his goods and retain the consideration he had obtained for them; or perhaps he might have been allowed to retain and give credit for the values transferred to him and claim judgment against J. & H. Black for the surplus, that is in what the value of the securities transferred fell short of the price of the goods.

He should either have affirmed the transfer and in addition claimed judgment for an amount to the extent of the cheat alleged to have been practised upon him, or he should have repudiated and abandoned the transfer and asked judgment for the value of the goods sold.

The transfer was the only instrument he had a legal right to complain of, and that by the judgment has been left still existing and intact. As between J. & H. Black and Roy he had no right to question transactions which they had concluded as between themselves, save in so far as they might have been used as a screen to conceal the true value of the securities transferred, and that would still be coming back to a complaint of being defrauded as to the values transferred.

He has nowhere complained of the insufficiency of the securities transferred, but only that the transactions between Roy and J. & H. Black were not genuine. But this he had no right to do, seeing that J. & H. Black and Roy were by their agreement thereto precluded from questioning these transactions, and Roy was legally bound to Walker the same as he had been bound to J. & H. Black.

It is not alleged that the deeds between Roy and J. & H. Black, more particularly the sale of the property, was or were shown or formed any part of the representations which induced Walker to agree to the bargain between him and J. & H. Black; therefore any pretended deception practised between Roy and J. & H. Black should be kept perfectly distinct and can only attach to the quality and value of the securities thereby established.

The alleged deceptions conducing to the bargain between Walker and J. & H. Black were, first, that Roy had not paid as was pretended $300 on account of the property; 2nd, that Roy was not as had been represented a man of means having other properties. Neither of these were sufficient to invalidate the transaction between Walker and J. & H. Black. The fact of $300 being receipted by the deed of purchase by Roy, or otherwise admitted to have been paid, whether true or false, merely augmented Walker's security by diminishing the amount chargeable

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on the property, and the fact of Roy being a man of means or a poor man was not necessarily so material a part of the consideration as to conduce to the agreement which had for its basis a security on real estate. It is not alleged that if these deceptions had not been practised, Walker would not have agreed to the bargain.

It is not alleged that Walker suffered any damage or injury by the falsity of the representations made to him, nor by reason of the deeds between Roy and J. & H. Black not being genuine.

As to the proof, the first and the material point, the only one that could affect the validity of the bargain between J. & H. Black and Walker, was misrepresentations by J. & H. Black to Walker before or at the time of the agreement and transfer, and of such there is no proof, nor of any representations whatever, save the statements contained in the transfer itself and these are all strictly correct. It is true that Walker himself says that Roy was represented to him as a man of means and as having paid $300 on account of the property, but this cannot make evidence in his favor, besides being open to the objection of adding to and varying a solemn deed or written instrument.

There is no doubt of the fact, and it is fully established by evidence in the case, that the $300 receipted in Roy's deed as a payment on account was not paid at the time, although provided for out of the revenues of the property, but it is not proved that a representation on the subject was made before or at the time of the transfer, and had such proof been made, it is not reasonable to conclude that it would have been sufficient to annul the transaction.

The same may be said of Roy being represented as a man of means; there is no proof of such representation prior to the transfer, and had there been such a representation, it is extremely improbable that it would have had any influence; there is no shadow of a proof, unless we take Walker's own assertion, that either of these facts formed any inducement to the bargain between J. & H. Black and Walker.

I now come to the consideration of what affects the value, the sufficiency or insufficiency of the securities transferred, and the bearing of this evidence, if any, on the validity of the agreement and transfer by J. & H. Black to Walker.

And first, as to the deeds between J. & H. Black and Roy being simulated, the only evidence applicable is that of Roy and of his son Charles H. Roy. The former had an interest in being relieved from his liability to J. & H. Black and took a partisan side with Walker, as will be seen by his letters written from New Haven, in Connecticut, where he and his son had gone to reside, apparently in answer to solicitations by Walker's agent that he should return to Montreal to give evidence against the Blacks; and the latter had had a dispute with the Blacks and was hostile to them. The former says that his son Charles H. Roy (presumably for the Blacks) asked him if he would buy property and he said: "I don't know. I said I would "if I got advantage to buy it." Again the Blacks asked me if I would buy property, "I say, yes, if I get it cheap enough "at advantage to buy." In cross-examination he said he did not sign the deed for the purpose of benefiting the Blacks; he did not know whether it was for their benefit or not. He signed it for "an accommodation." At another place he says: "I bought the property on risk." He (one of the Black's) told me if I could not pay for it, he would pay. He says if the property does not bring in Walker $2,000 so as to pay his claim, we will pay the balance. He also admitted that he paid nothing on account of the property, nor for expenses, nor insurance. The Blacks offered to let him collect the rents, but he told them to go on collecting.

Charles H. Roy's evidence goes to show that he was solicited by the Blacks to persuade his father to take a deed of the property. The Blacks knew his circumstances and that he was unable to pay. They said they would assume all liability for taxes and his father would never be troubled about the property, also that the Blacks promised to settle with and pay Walker, after the latter had made a demand on his (C. H. Roy's) father.

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It is questionable if this evidence proves the simulation of the deed, but if so, it was as between Roy and the Blacks, and only, if at all, affected the value of the security transferred by J. & H. Black to Walker. It is certain that Walker intended to accept a hypothec, not a property, and the transfer to him was of a hypothec which Roy, the debtor, could not repudiate. If, therefore, Walker was at all deceived, it could only be as to the value of the property which stood as security for the hypothec, and on this point the answer to Walker's objection is conclusive. Walker, on being examined as a witness, admits that before accepting the hypothec in payment for his goods, he went with one of the Blacks to visit the property, also that he sent Mr. Brown, an experienced valuator in Montreal, to see the property and value it. He was therefore not deceived as to the value, and as he did not know Roy and had never seen him, he could not have counted anything on his personal liability; so little that he never took the trouble to enquire. If conceded that Roy's acceptance of a deed was simply to accommodate the Blacks, there was nothing very unfair in their putting the security they had in its most presentable shape. Real estate in that locality was at the time unsaleable, unless at a very great sacrifice. Walker would not desire to have the trouble of seeing to the payment of taxes, leasing and repairs; although willing to accept a hypothec that would give him little trouble, he would not likely be prepared to assume the duties of a proprietor, and if the Blacks gave him a valid hypothec it was what he was likely to desire. On the direct evidence as to value there is a diversity of views, the estimates varying from about $1,200 to $2,500, but it is to be observed that those who give the low estimates indicate that they mean realisable cash value. It is shown that the property was assessed at $1,600 and at $1,800. That in Nov. 1877 the buildings on it were estimated by a regular insurance valuator at $2,032, that a house on it was rented at $13 per month or $156 a year; that it cost the previous owner Proulx from $3,000 to $3,500. Although Proulx is brought up to say that the price mentioned in

his deed to the Blacks was not the true price, yet he admits that the sale was for goods, and it does not appear what the goods amounted to, save by the price mentioned in the deed. Property varies rapidly in value, an over estimate or under estimate is no cause for dissolution of a sale ;— C. C., Art. 1012.

The pretention that Roy was the agent or *prête-nom* of the Blacks is a proposition wholly untenable. He dealt with them as a principal, he was so bound to them, and they transferred his binding obligation to Walker ; were it even mere accommodation, he is still nevertheless equally bound.

Put the worst feature on the transaction and admit for the sake of argument that the sale to Roy was a scheme concerted by Henderson to take advantage of a party to whom the security might be offered ; still the transaction could only be complained of to the extent that it was unfair ; the property, that is the hypothec, was at all events of considerable value and was transferred. Walker should in any event account for that value or repudiate and abandon it. I cannot see how he can maintain the anomalous position he has taken. I go further and say that there is no proof that he was deceived or that he suffered by any deception. The only thing he could reasonably complain of was the insufficiency of the security transferred to him, and this he had the opportunity of inspecting and judging of for himself. He accepted of it knowingly and has no right to claim. A vendor is not bound to warrant against vices known to the purchaser. It is a case where the maxim *caveat emptor* may be fairly applied, nor is it in fact proved that the transferee, Walker, was deceived as to value. I would reverse the judgment of the Superior Court and dismiss Walker's action.

MONK, J., also dissented, and concurred in the observations of Mr. Justice Cross.

RAMSAY, J. :—

It is sought to recover from appellants the amount of their indebtedness to respondent for goods sold them by the respondent, and also to declare a certain deed of obligation and hypothec null and void by reason of fraud.

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It appears that appellants who were in the habit of dealing with respondent, made a purchase from him to the amount of $2,000, and induced him to take in payment two instalments of a debt due them by one Roy, the debt being secured by an hypothec on real estate in Montreal.

The fraud alleged is this, that the appellants made a simulated sale to Roy, an insolvent, for a false price, that in the deed it was falsely declared that Roy had paid $300 on account of the price, that the appellants had assured respondent that Roy was a man of means, and that he had other property, that in fact he had no other property.

Only a part of this is established. It is not proved that appellants gave any warranty as to the condition of Roy, and it is clear they must have known he was insolvent, and the property was not of the value of the goods sold. Mr. Simard values it at $1,200 to $1,250, and Mr. Roy from $1,000 to $1,300. On the other hand, Mr. Trudel values it at $2,100, and Mr. Barré at $2,400 or $2,500. There is a charge on it of $400, so at the highest valuation it was not a sufficient security. Appellants bought the property for $1,600, and put the false price of $3,000 in the deed. It is also false that Roy, the defendant, paid $300 on account of the price. In the absence of any special warranty, and if the contract with Roy were real, all this might be very tricky and dishonest, but it would amount to no more than this, that the appellants wanted to exchange a house worth $1,600, or that had cost them $1,600 for goods worth $2,000, and the rule *caveat emptor* would apply. But if the contract with Roy was simulated, and got up for the purpose of perpetrating the trick which appellants have actually played, then the whole complexion of the affair is changed, and Mr. Walker has got face to face with the real debtors, the appellants. In other words they are the *garants* of Roy, and Roy, being the insolvent debtor of Walker, the latter can urge Roy's rights. Has Walker succeeded in proving that Roy has any rights against the Blacks? It seems to me that the proof of simulation is as perfect as possible. We have the posi-

tive testimony of Roy that he was not to be troubled. We have the extremely uncandid testimony of Mr. Henderson Black, nevertheless he admits that he gave a receipt to this perfectly insolvent purchaser for $300, which Roy was to pay shortly, and which he never did pay. Black says that they were to keep the property and collect the rents in order to pay themselves this sum of $300. This arrangement indicates wonderful simplicity on the part of acute business men, who, when they sell real estate, take the trouble to discharge the *bailleur de fonds* claim taking an hypothec instead, because, say they, it is more easily disposed of than a *prix de vente*. Perhaps it may have occurred to Mr. Henderson Black that this mode of manipulating a title is not altogether justifiable. At all events he certainly would have discovered if the sale had been a *bona fide* one, that the rents, amounting to $13 a month, would hardly be security for the interest on $3,000 at 8 per cent. — the interest amounting to $240 a year, and the rent to $156, from which repairs had to be deducted.

Such paltry excuses confirm the suspicions already created by the first aspect of the transaction. At all events we have it fully established by one of the defendants, that the deed is simulated as to the payment of $300, and that the appellants have always remained in possession of the property as owners ever since the sale. It is true the code, by a dogmatic utterance, declares the sale complete by the consent of the parties; but the courts, notwithstanding art. 1472 C.C., hold that this is to be understood *sub modo*. One of the distinctions is that where the vendor remains in possession, fraud will be presumed.

Again, we have the evidence of Charles Roy, as to the inducements to purchase by his father, and we have the testimony of Mr. Alderman Roy as to the attitude assumed by the Blacks.

We have, therefore, positive testimony of the most conclusive kind that the deed of sale to an insolvent was to some extent simulated, that no price was paid, that the vendors remained in possession, that they never

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claimed the price, but used the deed so acquired for the purpose of carrying out an audacious trick. To sustain such proceedings would be to discredit the law by setting at defiance those dictates of reason and common sense, which must be at the base of all systems of law. I am to confirm.

DORION, C. J.:—

I also think the judgment should be confirmed. There is, no doubt, considerable difficulty in the case as to the form of the action. It asks that the obligation from Roy to Black be set aside. This created a good deal of difficulty in my mind; but when I come to examine the whole case, I find that the appellants attempted to make a fictitious sale to Roy, in order to deceive, and as Roy is made a party to the cause, it is competent to Walker to ask that the transaction be set aside. I do not look upon the case as that of a creditor using the action of his debtor, because Walker is not the creditor of Roy. It is not upon that footing that I rest the claim of Walker, but because he has been deceived by this transaction into giving his goods for a property not worth half the value put upon it in the deed.

Judgment of S.C. confirmed, Monk and Cross, JJ., dissenting.

Geoffrion, Rinfret & Dorion for the Appellants.
L. N. Benjamin for the Respondent.
(J. K.)

September 27, 1884.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

THE QUEEN v. JOHN ROSS.

Perjury by witness in Civil Suit—Production of Record—Materiality of Facts sworn to by Defendant—32-33 *Vict.* (*Can.*), *c.* 23, *s.* 7—*New Trial ordered upon Reserved Case in Misdemeanour.*

HELD:—1. The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the defendant is alleged to have given false testimony, is not material where the assignment of perjury has no reference to the pleadings; but the defendant, if he wishes, may, in case the plea be not produced, prove its contents by secondary evidence.

2. It is not essential to prove that the facts sworn to by the defendant, as alleged in the indictment, were material to the issue in the cause in which the defendant was examined.

3. A Reserved Case may be amended at the request of the defendant, during the argument thereon before the full Court, by adding the evidence taken at the trial.

4. (Following *Reg.* v. *Bain*, 23 L. C. J. 327) A new trial may be ordered on a Reserved Case, in misdemeanours, where it appears to the Court on the evidence that an injustice may have been done to the defendant.

Reserved Case:

"On the 13th day of June instant, in the Court of Queen's Bench (Criminal side), the defendant, John Ross, was found guilty on a charge of *Perjury*, contained in the following indictment:—

"'The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the Term of the Circuit Court holden for the District of Montreal, in the City and District of Montreal, on the 5th day of May, in the year of Our Lord 1884, before the Hon. F. G. Johnson, one of the Judges of Her Majesty's Superior Court for Lower Canada, a certain issue, in which one Samuel Edwards, of the City and District of Montreal, laborer, was plaintiff, and the Canadian Pacific Railway Company, a body politic and corporate, was defendant, in a certain action of damages

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for breach of contract, bearing the number 8,694 of the records of the said Circuit Court, was tried, upon which trial one John Ross appeared as a witness for and on behalf of the said Samuel Edwards, the said plaintiff, and was then and there duly sworn before the Hon. F. G. Johnson, one of the Judges of Her Majesty's Superior Court for Lower Canada as aforesaid in the said Circuit Court, and did then and there, upon his oath aforesaid, falsely, wilfully and corruptly depose and swear in substance and to the effect following: That he (the said John Ross) did not hire any men to work on board the steamship Alberta, and did not hire Edwards (the said Samuel Edwards, the said plaintiff,) to work on board the steamship Alberta (to wit, a certain vessel so named that lay in the Port of Montreal last fall, and of which the said John Ross was supposed to be the captain); whereas in truth the said John Ross did hire several men to work on board the said steamship Alberta in the month of November last, and did hire Edwards (the said Samuel Edwards. the said plaintiff,) to work on board the said steamship Alberta on the 8th day of November, 1883, and the said John Ross did thereby commit wilful and corrupt perjury against the form of the statute,' etc.

"Trefflé Lamontagne, Deputy Clerk of the Circuit Court, was the first witness examined for the prosecution, and produced and proved the record in the case of *Edwards* v. *The Canadian Pacific Railway Company*, in which the defendant was charged with having committed the perjury for which he was tried.

"After the writ and declaration had been proved and read to the jury, the counsel for the defence asked that the plea be also read to the jury, when the witness stated that the plea was not in the record, and could not be found, although it appeared that a plea had been filed in the cause.

"The defendant by his counsel immediately took exception to the production of an incomplete record, owing to the absence of the plea which was neither produced nor proved.

"I however directed that the trial should be proceeded with.

"At the close of the case for the prosecution, the defendant submitted that there was no case to go to the jury: 1st. Because the whole record in the cause in which the perjury charged was alleged to have been committed had not been proved. 2nd. Because it did not appear that the matter sworn to was material to the issue in the cause.

"I ruled against the defendant, who entered upon his defence, and the jury returned a verdict of *guilty*.

"The defendant then moved that the verdict be set aside, and a new trial ordered, on the following grounds:

"1st. Because the said verdict was rendered contrary to the evidence given on the trial.

"2nd. Because at the trial the record of the case of *Edwards* v. *The Canadian Pacific Railway Company* was not produced and proved in a complete state, the said case being the case set out in the indictment as the case wherein issue had been joined, wherein the alleged perjury was committed, the plea filed by the defendant not having been in the said record and not having been proved on the said trial.

"3rd. Because the facts set out in the assignment of perjury in the said indictment in this case were not facts, matters or things required or authorized by any act or law now or at any time in force in the Dominion of Canada or in the Province of Quebec, to be verified, or otherwise assured or ascertained by or upon oath, affirmation, declaration or affidavit of some or any person in the said case of *Edwards* v. *The Canadian Pacific Railway Company*, set out in the said indictment, wherein the perjury charged is alleged to have been committed by the said defendant.

"4th. Because the facts, matters and things contained in the assignment of perjury set out in the said indictment were not facts, matters or things required or authorized by any law or act now or at any time in force in the Dominion of Canada or in the Province of Quebec, to be

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verified or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of some or any person in the said suit in the Circuit Court of *Edwards* v. *The Canadian Pacific Railway Company*, defendant.

"5th. Because the plea in the case of *Edwards* v. *The Canadian Pacific Railway Company* not having been produced and proved, it was impossible to decide what facts, matters or things were required or authorized to be verified or otherwise assured or ascertained by or upon the oath of the said defendant.

"6th. Because by the evidence of the Hon. Mr. Justice Johnson, holding the Circuit Court on the 5th day of May last past, when the said case of *Edwards* v. *The Canadian Pacific Railway Company* came on for trial, and before whom the said defendant was sworn and examined, it was proved that the said facts, matters and things set out in the assignment of perjury in the said indictment contained, were not facts, matters or things required or authorized to be verified or otherwise ascertained or assured by the oath, affirmation, declaration or affidavit of some or any person, or of the defendant in the said suit of *Edwards* v. *The Canadian Pacific Railway Company*, under and by virtue of any act or law then in force in the Dominion of Canada or in the Province of Quebec.

"7th. Because the said verdict is contrary to justice and a new trial will further the interests of justice.

"8th. Because it was clearly proved that no such evidence was ever given by the defendant as that contained in the assignment of perjury in the said indictment.

"I refused to grant this motion, but at the request of the defendant I reserved for the consideration of the Court sitting in appeal, the following questions:—

"1st. Was it necessary for the prosecution to produce and to prove at the trial the plea which had been filed in the case of *Edwards* v. *The Canadian Pacific Railway Company*, in which cause the perjury charged was alleged to have been committed?

"2nd. Was it necessary to prove that the facts sworn to by the defendant as alleged in the indictment were

material to the issue in the cause in which the defendant was examined.

"If the Court is of opinion that either of the above questions should be decided in the affirmative, then the verdict should be set aside and a new trial ordered as prayed for, otherwise the verdict should remain in force.

"The defendant was admitted to bail to appear at the sitting of the Court of Queen's Bench to be held at Montreal, in the month of November next.

A. A. DORION, C.J."

"Montreal, 17th June, 1884.

"On the hearing of the case (Sept. 19), and at the request of the defendant, the Reserved Case was amended as follows, by adding the evidence taken at the trial except such as had reference to the record in the Circuit Court and to the good character of the defendant. The evidence is as follows:—[We extract merely the evidence of Mr. Justice Johnson and of Mr. Heneker, which suffices for the purposes of the present report.]

The evidence of Mr. Justice Johnson was as follows:—

"I presided in the Circuit Court on 5th May last. I recollect a case of *Edwards* v. *Canadian Pacific Railway Co.* A Capt. Ross was heard as a witness; cannot recollect his face and say whether defendant is the same man. I should not have remembered anything about this case except from being asked the day after the trial, and took a note of my ruling that no question could be asked to establish any personal liability on the part of Mr. Ross. I recollect that a question was put asking Capt. Ross whether he had engaged some men to work on the Alberta for the Canadian Pacific Railway. I cannot say whether any questions had been put irregularly as to Capt. Ross having personally engaged Edwards. If it had been done to my knowledge I would have stopped it. Proceedings are somewhat irregular in the Circuit Court, and it is difficult for a person standing by to understand the purport of questions put to, and of answers given by, a witness."

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The evidence of Mr. Heneker, Advocate, was to the following effect:—

"I conducted for the defendant the case of *Edwards* v. *The Canadian Pacific Railway Co.*, on 5th May last. I know defendant Ross. He was examined as a witness in that case for plaintiff, but had been brought, I believe, by defendants, the Canadian Pacific Railway Co. He went into the box; he was asked whether he was employed by the Canadian Pacific Railway Co. He said, no. Then he withdrew. Another witness was examined, and defendant was again called by Mr. Barry, and asked whether the S. S. Alberta belonged to the Company, and the second question, I believe, was whether he had engaged men to work on the ship Alberta for the Canadian Pacific Railway Company, or for the Company, and he said, no. Then he was asked whether he had engaged Edwards and he answered, no. This was the purport of his answers, and not the exact words."

"3rdly. If considering the evidence and the whole circumstances of the case a new trial should be granted to the defendant.

A. A. DORION, C.J."

On the 26th September, the argument was resumed on the case as amended.

Kerr, Q.C., for the defendant:—

The first question is as to the power of the court to interfere and grant a new trial. I submit that in cases of misdemeanour, where the court think that better justice can be done by granting a new trial they have the right to set aside the verdict and grant a new trial.

RAMSAY, J.—The court exercised the right in the case of *Reg.* v. *Bain* (1).

Mr. Kerr.—I also cite Archbold's Practice and Pleading, 19th edition, page 194. In *Rex* v. *Mawbey* (2), Lord Kenyon observed that in granting new trials the court know no limitations, but they will grant or refuse a new

(1) 23 L. C. J. 327.

(2) 6 Term Reports, p. 638.

trial as it will tend to the advancement of justice. In this case the weight of evidence is in favour of the defendant. Mr. Justice Johnson, who presided at the trial of the case in the Circuit Court, said that he did not hear the question put, and would not have allowed it if he had heard it. Mr. Heneker, who was counsel in the case, states that no such question was put. The Clerk of the Court says he is under the same impression. Against this there is the evidence of five labouring men who were all interested, having similar actions against the Canadian Pacific Railway Company.

D. Barry, for the prosecution, pointed out that the witnesses on the side of the prosecution spoke positively, while the witnesses for the defence were not so clear on the point.

DORION, C.J.:—

This is a Reserved Case upon a conviction of perjury at the term in June last. Two questions of law come up: (1) It was said that the complete record of the case before the Circuit Court, in which the perjury was alleged to have been committed, was not proved, inasmuch as the plea was not in the record. I ruled at the trial against the defendant on this point, and held that it was not necessary, inasmuch as the assignment of perjury had no reference to the pleadings. (2) That it was not proved that the facts sworn to and mentioned in the indictment were material to the case. I ruled upon that point that under the law as amended by the statute of 1869 it is not necessary to make such proof, for since the statute above-mentioned every fact sworn to is considered to be material. Then there was a motion for a new trial. At first I had great doubt whether I could enter into that question, but finally I reserved the whole case both upon the above-mentioned two points and upon the motion for a new trial.

It must be admitted that this is a peculiar case. Some authorities have been cited to show that it is in the discretion of the Court to grant a new trial. I am not prepared to go to the extent of the opinion given by Lord

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Kenyon. New trials have been refused in some cases, even where the Judge would have granted a new trial if he had been acting as a jury. The credibility of the witnesses is a question for the jury. If I had been on the jury in this case, I would not have given a verdict against the prisoner. It is, as I have said, a peculiar case. First, it was an oral statement, which was proved before the jury by verbal testimony alone. The defendant was accused of swearing that he had not engaged Edwards and another man for the Alberta. The difficulty was this: did he swear that he did not engage them at all, or merely that he did not engage them for the Canadian Pacific Railway Company? The Judge states positively that the question was: did he engage them for the Canadian Pacific Railway? that he did not hear the other question put, and if he had heard it he would have stopped it. Mr. Heneker, the counsel in the case, swears positively that the question was whether Ross engaged the men for the Canadian Pacific Railway. Mr. Drinkwater says the same thing. On the other hand, there are four witnesses who state that the prisoner swore he did not engage the men at all. I charged the jury, perhaps not so strongly as I should have done, but I pointed out the difficulty of convicting a man upon such testimony as this, and where the witnesses for the defence were much more intelligent than those for the prosecution. The jury found a verdict of guilty. Under the peculiar circumstances of the case, I am of opinion that the defendant should have a new trial. At present I feel that there is considerable difficulty, and certainly if I had been on the jury I would not have convicted the defendant. He will have the benefit of a new trial, and if another jury thinks proper to convict, then the verdict will stand.

RAMSAY, J.:—

I entirely concur with the learned Chief Justice in his rulings at the trial of the defendant. The statute clearly lays down the rule that materiality of the false testimony to the issue is not an essential in perjury. It has always

appeared to me that this enactment was a dangerous, and hardly necessary, innovation. The object was, of course, to avoid a failure of justice by pretending that under some very technical rule of pleading the matter was not within the issue, and therefore a person who had wantonly and corruptly stated what was false might escape punishment; but facility of conviction, desirable in some cases, has its dangers, and I do not think the statute should be so interpreted as to declare that materiality to the issue is not to be considered.

I also agree with the Chief Justice in thinking that the inability to produce the plea was of no importance. It might, however, have given the defendant the right to prove the plea by secondary evidence if it had been important to him. But really no question arose on the plea.

But the case has been amended, and a third question is now submitted to us, namely, whether the defendant should have a new trial on the ground that the verdict was so ill-supported by the evidence that it is to be presumed the defendant has not had a fair trial. This raises two questions: whether on a reserved case, on a trial for a misdemeanor, this Court has the power to grant a new trial? Second, whether, having that power, this is a proper case for its exercise?

The former of these questions has been formally decided by this Court in the case of *Reg.* v. *Bain*, where we held that this Court has the power to grant a new trial in perjury. The latter of these questions appears to me to be also affected by Bain's case. There we granted the new trial on the ground that it was probable the jury were misled, else they would not have brought in a verdict of guilty. This case appears to me to have a great similarity with that case. We have first the witnesses for the prosecution, with a common interest, swearing positively to a certain question being put. They are asked if another question, somewhat like the one as to which the perjury was assigned, was put, which it seems it was, and they don't know. Again, the Judge who tried the civil suit

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heard no such question as that sworn to by the witnesses for the prosecution; he would not have allowed it to be put if he had heard it, and we now know that he stopped further questions on that part of the case. Another thing struck me on reading the evidence. The question is: did you engage the defendant or men for the Alberta? and he answered "No." Now, it is perfectly clear that the suit was brought to decide whether what passed between Edwards and Ross amounted to an engagement. Evidently it was only a constructive engagement, and Ross was not asked any question about the details, but only whether he engaged the men or not. It is possible this may be a corrupt mis-statement, but it appears to me to be one way of saying that he did not consider it an engagement. He had some ground for thinking there was no engagement, for it appears the rate of wages was not settled, at all events, with Edwards, and if he merely meant to convey the idea that there was not what he considered a final engagement there was no perjury in the matter. His intention might have been made clear if the interrogation had been proceeded with, but the matter was let drop. Mr. Barry explains this by saying the Judge stopped it; but that should not militate against the accused. I therefore concur with the opinion of the Court that a new trial should be granted.

MONK, J.:—

I entirely concur in the decision of the Court ordering a new trial, for the reasons assigned by the Chief Justice, which reasons appear to me entirely conclusive.

The following is the judgment of the Court:—

"Considering that there was no error in the rulings of the Judge presiding at the trial against the defendant on the first and second questions reserved in the Reserved Case;

"But considering that, from the whole circumstances of the case, there appears to have been some misapprehension as to the nature of the questions put to the defendant and to the answers thereto, and that owing to such

misapprehension the defendant may have been taken by surprise and the jury misled, and that it is proper that a new trial be granted to the defendant;

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"This Court doth set aside the verdict against the defendant, and doth order that a new trial do take place in due course at the next or at any subsequent term of the Court of Queen's Bench, sitting on the Criminal side at Montreal."

Verdict quashed and new trial ordered.

D. Barry, for the private prosecution.

W. H. Kerr, Q.C., for the defendant.

(J. K.)

November 24, 1884.

Coram RAMSAY, TESSIER, and BABY, JJ., and DOHERTY and CARON, JJ. *ad hoc.*

R. A. R. HUBERT,

(*Intervenant below*),

APPELLANT;

AND

THE CITY OF MONTREAL,

(*Defendant below*),

RESPONDENT.

Intervention—Prescription—42-43 *Vict.* (*Q.*) *ch.* 53—*Assessment roll*—31 *Vict.* (*Q.*) *ch.* 37.

HELD: 1. Where an action had been brought by one of several persons assessed for the cost of a special improvement, to set aside the assessment roll, that any other person assessed for the cost of the same improvement had an interest which entitled him to intervene if the original plaintiff abandoned the case.

2. Where an action was instituted before the expiration of the delay fixed by a Statute for contesting assessment rolls, the right of an intervenant taking the same conclusions as those of the original action was not barred, though the delay had expired before the intervention was filed.

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The judgment of the Court was rendered by

RAMSAY, J.:—

This is an action *en nullité de rôle de cotisation*. It was brought by the Molsons Bank, and the appellant, finding that the Molsons Bank was about to abandon the action, intervened. The action was dismissed on the merits, and the intervening party appealed.

The Corporation, respondent, meets this appeal by saying that the intervening party has no right to be in the case at all, for that, by a statute (42-43 Vic. chap. 53), there is a limitation of thirty days for bringing an action to annul a roll of assessment from the 31st October, 1879,—that the intervention was only filed the 7th June, 1880, and that therefore it is too late.

This objection does not appear to me to be very formidable. In the first place, there is a judgment allowing the intervention, from which there is no appeal, and next, I think that judgment is correct. Without entering into any consideration of whether the action of the Molsons Bank is in any sense an *action populaire* or not, it is clear that a number of persons with separate interests depending on a common cause, determined that one of them should bring a suit to annul, and the Molsons Bank suit was so brought. Owing to some change of circumstances, the Molsons Bank desired to settle its suit and to withdraw, and notified the other parties, whereupon the appellant intervened and took precisely the same conclusions as the original plaintiff, in order to avoid the difficulty of this peculiarly short limitation of the statute. All the writers on Procedure seem to be agreed that interest either in suing or defending is the basis of the right to intervene, and I see no limit to it. Pothier (Tr. de la Pro. Civ.) says:—"L'intervention est un acte par lequel un tiers demande à être reçu partie dans une instance formée entre d'autres parties, soit pour s'y joindre au demandeur, et demander la même chose que lui, ou quelque chose de connexe, soit pour se joindre au défendeur, et combattre avec lui la demande du demandeur qu'il a intérêt de détruire."

In this case appellant's interest is evident. He did not bring an action himself, because he trusted to that of the Molsons Bank. This is an exceptionally favorable position, if that can alter the question.

An argument is used by respondent which, I confess, I do not clearly understand. It is said the action is *in rem*, and therefore it interested the bank alone. I am not aware of any such distinction in the books affecting the right to intervene, nor do I see why it should signify whether the action be *in rem* or *in personam*. The only question is as to whether the *intervenant's* right is sufficiently direct.

Passing to the merits of the intervention, it is maintained, on the part of the Corporation, that the decision of the Judicial Committee makes a distinction between the assessment and the assessment roll. It would not be easy to confound them, but it is not so obvious what argument bearing on this case can be drawn from this distinction. If the commissioners' powers were at an end when they performed the culminating act, their whole proceedings were null. They were appointed to do a thing as a whole, within a certain time, and doing only a part of it within that time was not a performance of any distinguishable part of their duties. The Privy Council declared, as this Court did, that time was of importance—that is to say that the commissioner's powers lapsed by time. They did not say that Mr. Hubert could not be assessed, but that he was not then rightly assessed. It was not necessary to decide any other issue.

The question before us, therefore, is whether appellant is rightly assessed now, and that question does not seem to be affected by anything that took place in the previous case. It related to the assessment roll of the 11th August, 1868. The present suit contests the roll of the 5th December, 1878.

It is not contended that under the old statutes there was any means of rectifying an omission such as that of the commissioners in 1868; but respondent relies on three statutes of the Province of Quebec as giving power to

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make a new assessment roll where there is a defect in the original assessment roll. These statutes are the 32 Vic., chap. 70, sec. 13; the 37 Vic., chap. 51, sec. 188, and the 42-43 Vic., chap. 53, sec. 4.

The Act 42-43 Vic. is not further in question than in so much as it necessitated the institution of this action, for one of its declaratory clauses provides that all rolls of assessment prepared and completed since the 29-30 Vic., "which have not been contested in any court," shall be held to be now valid and obligatory and binding in law to all intents and purposes whatsoever, unless contested within thirty days from the coming into force of that act, that is since the 31st October, 1879; and in so far as it limits what may be urged as a cause of nullity in any assessment roll.

On the first point, already explained, we are against the respondent. We have next to enquire by what authority the roll of 1878 was made.

It is hardly necessary to examine very critically the dispositions of the Act of 1869, for in 1874 the charter of the respondents and the acts amending it were consolidated (37 Vic., chap. 51), and section 188 was evidently intended to take the place of section 13 of the Act of 1869, although differing to some extent from it. The scheme of the Act seems to have been the creation of commissioners for assessing only, and they were to proceed either where there is an amicable settlement as to the value of the property expropriated, or where proceedings in expropriation are valid and simply the assessment invalid. It was on this idea the roll now attacked was made.

The first point appellant raises is that the resolution of the Council was illegal, not having been authorized by the parties interested. The second, that there was a declaration of a majority in value of the parties interested, objecting to the improvement; and the third is that the Act of 1869 only applies to the future, and that the roll was annulled in 1873. In this last proposition there is evidently some mistake.

To understand the first of these difficulties we must go

back to the laws in force when the expropriation was made. This is by no means an easy business. The 27 and 28 Vic. (26th June, 1864,) was an act of rather a draconian type. It is justly termed by the City Clerk as the "Law on Expropriations." The general doctrine of the City Council is that they, representing the Corporation, are alone entitled to decide what is an improvement and what is not. In its most abstract form the doctrine is not beyond question; but when we engraft on it this other doctrine, that the City Council shall decide whether the improvement is of such a nature that the cost in whole or in part shall be borne by a certain class of individuals, the untenable character of these pretensions becomes so apparent as to force itself on the attention of the most superficial observer. As a consequence of pushing an advantage too far, a re-action set in of so thorough a nature that the whole scheme of expropriation was almost upset. By the 11th section (29 and 30 Vic., chap. 56,) a majority in value of the proprietors interested could by a declaration stop the whole proceedings. By the 12th section it was enacted that simultaneously with fixing the amount of indemnity the commissioners should also fix by whom and in what proportions it should be paid, "in whole or in part, conformably to the resolution of the said Council."

In 1868 there was an amendment to sections 11 and 12 of the last-named act (31 Vic., chap. 37, sec. 9), by which it was provided that these sections should be explained and modified "in manner and to the extent following:— The said commissioners, before proceeding with the valuation required by the said sections, shall begin by determining who are the parties interested in and to be specially assessed for the purpose of the proposed improvement, and draw up a report thereof, and give public notice of the same by an advertisement to be inserted during ten days in two English and two French daily newspapers published in the city of Montreal; and the said parties so notified who desire to oppose the said proposed improvement shall be bound to file their oppositions in the hands

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of the said commissioners within three days from the date of the last insertion of the said advertisement, the said commissioners, upon the filing of the said oppositions, to proceed as mentioned in the said sections." One is utterly at a loss to understand where the modification and explanation begins and where it ends. The section establishes a totally new provision. As I understand appellant's argument, it is that this notice was not and could not be given, and that therefore no valid expropriation could be made, or indeed it would seem that no assessment could ever be made subsequent to the fixation of the cost of expropriation.

It seems to me to be obvious that under the terms of the 32 Vic. or 37 Vic., no valid assessment roll can be made on an invalid expropriation—that is to say, invalid for matters not covered by 42 & 43 Vic., chap. 53 (matters of form, and that the rolls of assessment were not made at the proper time or at the same time as the valuation rolls).

I cannot agree with appellant that he has shown anything illegal in the resolution of the Council; but, on the other hand, I do not see how it was possible for the commissioners to draw up a report of the parties interested and liable to the special assessment either under sections 11 and 12 of the Act of 1866 or under section 9 of the Act of 1868. The parties interested were therefore not on their guard, and the defect goes beyond and behind the assessment roll. It is not only the assessment roll that is bad, but the other proceedings in expropriation, which could only be carried on simultaneously with the assessment, according to the system of the Act of 1866, or after the parties interested were warned, according to the system of the Act of 1868. As an illustration, we have an opposition by some of the interested parties on the 9th January, 1868, and now it is said this was not made by a majority in value. If there was no assessment or apportionment, how could this be determined? Or how could the persons really interested exercise the power to object? This is not a matter of form, covered by sec. 8, 42 & 43

Vic. It is substantial as to who shall pay, and as to whether the improvement shall be carried on under the resolution of the Council.

It is urged by the respondent that the homologation of the proceedings by the Superior Court was *res judicata* to all the world as to what took place on the expropriation, so that the commissioners, having omitted the principal part of their duty, might be absolved from its performance by the *exparte* homologation of their illegal proceedings. This proposition is not supported by any authority, so far as I know.

If the Legislature seriously intended by the Act of 1879 to deprive the parties interested of the protections afforded by the Acts of 1866 and 1868, it is a pity they had not the courage to say so clearly. If effect were given to the views of the Corporation, we should have the provisions of the two last-named Acts disregarded, and then, under pretext of giving a favorable interpretation to a "remedial measure," we should have the illegal proceedings declared valid. Now, what is remedial in that? It is a remedy all on one side. The remedy is for the party who did not give his adversary the notice he was entitled to. I do not contest the power of the Legislature to enact *ex post facto* laws, or even to style them remedial, whether they be so or not, but this I do say—that if it be expected that courts of justice are to give effect to legislation of this sort, the intention of the legislation must be framed in such a way as to leave no doubt as to the deliberate intention of the Legislature. Speaking for myself, and so far as I may be called upon to act, I may say this—that I shall assume no individual responsibility in the execution of unprincipled laws. Compelled by a special article of the Code to judge, even where the law is obscure, I shall in such cases always determine that the statute is unmeaning rather than vicious.

On the third point, I am against appellant. The Act of 1874 is a re-enactment of that of 1869, and the former Act was before the annulling of the assessment roll.

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DOHERTY, J.:—

I have had very little difficulty, upon the merits of this case, in coming to the conclusion that the judgment should be reversed. The failure of the commissioners to give notice of their proceedings was fatal to the validity of their report. I have considerable difficulty, however, with reference to the right of the appellant to intervene; but, after full consideration of the point, I am not disposed to differ from the Court upon this ground.

The following is the judgment, as recorded:—

"The Court, etc.

"Considering that the appellant had an interest in the suit pending (to wit, on the 5th day of June, 1880,) between the Molsons Bank and the respondent, and the said appellant was entitled to intervene and become a party to the said suit;

"And considering that the limitation or short prescription invoked by respondent does not determine the right of the appellant to set aside the assessment roll, but is only a limitation of the right to institute a suit for that purpose; and whereas the said action of the Molsons Bank against respondent was instituted before the expiration of the time of such limitation;

"Doth adjudge and declare that the said appellant had a right to intervene and become a party to the said suit, and to plead and maintain all the grounds and reasons against the said assessment roll he might have pleaded and maintained had he been originally a party to the said suit of the Molsons Bank against the City of Montreal;

"And considering further, that the assessment roll was made by the commissioners without dealing with the opposition of the appellant and other proprietors to the carrying out of the alleged improvement;

"And considering that the said assessment roll was made, as well as the valuation roll on which it was based, without notice to the parties interested, and particularly without their having any opportunity to contest the same or to be heard concerning the same;

"And considering there is error in the judgment

appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal on the 30th September, 1882;

"Doth reverse, set aside and annul the said judgment of the 30th September, 1882;

"And proceeding to render the judgment which ought to have been rendered, doth maintain the intervention of the appellant, and doth declare the assessment roll in question in this cause, to wit, the assessment roll of the 6th December, 1878, to be irregular, null and void, and doth set aside the same with costs against the said respondent as well as in the Court below as on this appeal."

Judgment reversed.

Barnard, Beauchamp & Doucet, attorneys for the appellant.

R. Roy, Q.C., attorney for the respondent.

(J. K.)

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27 janvier 1885.

Coram DORION, J.C., RAMSAY, TESSIER, CROSS, and BABY, JJ.

PAMPHILE BIRON,
(*Demandeur en Cour inférieure*),
APPELANT;

ET

ANTOINE TRAHAN,
(*Défendeur en Cour inférieure*),
INTIMÉ.

Vente d'immeubles—Crainte de l'acheteur d'être troublé—Cautionnement—Art. 1535 *C. C.—Matière discrétionnaire—Limitation du cautionnement.*

JUGÉ:—1o. Que la question de savoir si l'acheteur a juste sujet de craindre d'être troublé et peut demander caution en vertu de l'art. 1535 C. C., est une matière discrétionnaire, dans laquelle cette Cour sera peu disposée à déranger le jugement de la Cour de première instance.

2o. Que lorsque la Cour de première instance a condamné le vendeur à donner caution, sans limiter la durée de tel cautionnement, la Cour d'Appel réformera le jugement à cet effet.

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RAMSAY, J. (*diss.*):—

This case comes up in appeal from a judgment ordering appellant, plaintiff in the Court below, to give security for costs.

Only one question arises of any moment, it is whether the defendant is within the scope of Art. 1535. A good many cases bearing more or less on the question have been cited, but what we have to look at is the sense of that article. Has the defendant just cause to fear that he will be disturbed? It has been decided, and I think correctly, that it is not necessary for the defendant to show that there is an absolute title, but only that there is a *prima facie* title adverse to his own, or that his title is apparently bad. It cannot however be questioned that the plaintiff may at once show that the difficulty does not exist. Now how does the case before us stand? Appellant sued respondent for one instalment of purchase money. Respondent answered by saying: you have given me by error a title to a piece of land in the 4th range of Weedon which is actually in the 5th range,—there is a proprietor in possession of the land of which this piece of land forms a part—one Demers—and the defendant fears to be *troublé* by Demers.

To this defence plaintiff pleads:

1. That in fact respondent has got all he was promised by his deed, for the title described the very lot of which it is admitted defendant has possession by a special description, which is in no way attacked.

2. That plaintiff's title is good by prescription of 30 years and of 10 years.

3. Improvements the value of which defendant might claim.

4. That defendant's tender was null.

The third and fourth of the replies of plaintiff are untenable. An incidental claim of that sort is no equivalent for his money. What the law allows him is security or the money itself. The tender seems to be sufficient, and at all events it was and is refused, so that a technical irre-

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gularity could not affect the main question. We therefore have to consider the two first propositions. It seems that by an old government survey the township of Weedon was laid out. No. 11 in the 4th range became the property of the Canada Land Co. A fourth of it was sold to one Fournier, who sold to Delude, who sold one arpent of it to Biron, who again sold this arpent to Trahan. Some time before the sale to Trahan the defendant, it was rumoured that Richard, a land-surveyor, had discovered that, owing to some miscalculation, the dividing line between the 4th and 5th ranges had been drawn about three acres too far to the north, at all events as far as lot 11, and that the effect would be to place this arpent in the 5th range instead of in the 4th range. To get over this difficulty the deed to Trahan described the acre of land somewhat differently from the former deeds, and specially added that it should be *ainsi qu'il a toujours été reconnu avant ce jour*. It now seems that the error indicated by Richard really exists, and that Fournier and his *ayant cause* had no title whatever to the lot of land built upon by him and sold by appellant to respondent. If Biron has conveyed no title to what he has delivered, it is evident that there must be a serious danger of eviction.

But respondent putting the possession *animo domini* of all his predecessors together has a perfect title. He is therefore not in peril, and I think the judgment should be reversed.

TESSIER, J.:—

Il est regrettable que cet appel ait été pris, car le résultat ne peut pas être d'une grande importance pour les parties. Le 12 décembre 1881 l'appelant vendit à l'intimé un emplacement décrit comme suit à l'acte de vente :

"Un lopin de terre ou emplacement sis et situé dans le "township de Weedon, formant partie du lot numéro "onze, dans le quatrième rang, d'un arpent de largeur "sur un arpent de longueur, à prendre et à détacher du "lot de terre susdit et qui se trouve à vingt pieds du cor- "don du cinquième rang, ainsi qu'il a toujours été reconnu

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"avant ce jour, tenant en front au chemin de ligne qui "conduit à la rivière St. François; En arrière et des deux "côtés à un nommé Blanchet, avec la maison et les autres "bâtisses qui y sont construites."

Le prix stipulé était de $300, dont $100 payées comptant et la balance payable $100 le 12 décembre 1882 et $100 le 12 décembre 1883, sans intérêt. L'action est pour le versement dû le 12 décembre 1882.

L'intimé plaide que par erreur l'appelant lui a donné possession d'un morceau de terre partie du lot numéro 11 dans le 5me rang au lieu du 4me rang de Weedon; qu'il n'a aucun titre à la partie qu'il occupe, laquelle appartient à un nommé Demers; qu'il craint d'être troublé dans sa possession par Demers, et qu'il a droit de demander caution à son vendeur en vertu de l'article 1535 C. C.

Le jugement *a quo* a décidé que l'intimé avait un juste sujet de crainte, et a condamné l'appelant à lui donner caution.

Toute la question est de savoir si ce jugement a eu raison de décider que suivant l'article 1535 C. C., l'intimé avait lieu de craindre qu'il serait troublé.

L'appelant répond d'abord à cette défense que l'intimé a acquis le bénéfice de la prescription décennale, mais cette prétention n'est pas soutenable, attendu que le dernier acte diffère des précédents. En 1881 on ajouta à la description du terrain les mots: "ainsi qu'il a toujours été reconnu avant ce jour," qui ne se trouve dans aucun acte antérieur à celui-là.

L'appelant invoque aussi la prescription trentenaire qu'il allègue avoir été acquise par l'intimé et ses auteurs. Il paraît que la ligne de division tracée entre le 4me et 5me rang par l'arpenteur de la Couronne remonte à l'année 1818. En 1836 la compagnie des terres ("British American Land Co.") avait obtenu de la Couronne un octroi du lot en question avec plusieurs autres terrains situés au canton de Weedon. L'arpenteur de la Couronne traça vers cette époque une ligne de division qui fut adoptée par les colons, mais qui différait de celle du gouvernement, de sorte que lorsque plusieurs années après

elle a été rectifiée par l'arpenteur Richard, qui a rétabli l'ancienne ligne de la Couronne, le morceau de terre en litige s'est trouvé faire partie du 5me rang au lieu du 4me, comme on l'avait d'abord cru.

La compagnie possède une grande étendue de terrain dans Weedon et a fait tirer les lignes entre les différents rangs il y a peut-être au-delà de trente ans. Mais à cette époque elle possédait les deux lots Nos. 11 du 4me et du 5me rang. Aucune prescription ne pouvait par conséquent commencer à courir, car pour qu'il y ait prescription il faut un antagonisme entre des parties. Ce n'est qu'en 1869 que ces lots ont été possédés par des parties différentes, entre lesquelles la prescription pouvait avoir lieu.

Donc l'intimé n'a acquis ni la prescription trentenaire ni la prescription décennale, et il peut craindre d'être troublé par Demers. Le tribunal me parait avoir agi avec prudence en maintenant les prétentions de l'intimé, et comme c'est une affaire de discrétion je pense qu'il vaut mieux laisser le jugement tel qu'il est, sauf la légère modification que je mentionnerai plus bas.

D'ailleurs Demers n'est pas en cause, et cette décision ne peut pas être chose jugée contre lui.

Il reste une question soulevée par l'appelant mais qui ne mérite pas l'attention de cette Cour. L'appelant prétend que le jugement aurait dû condamner le défendeur à payer 15 centins d'intérêt outre le capital, mais nous ne dérangerons pas un jugement pour une bagatelle comme celle-là : *de minimis non curat lex.*

La majorité de cette Cour est donc d'opinion de confirmer le jugement de la Cour Supérieure en le réformant sur un point en faveur de l'appelant. D'après le jugement le cautionnement pourrait durer indéfiniment, et une action serait peut-être necessaire pour y mettre fin. Nous ordonnons en conséquence que le cautionnement dure pendant dix ans, ce qui évitera un litige possible. A défaut par l'appelant de fournir ce cautionnement, il est condamné à payer à l'intimé la somme de $100.

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DORION, J. C. :—

J'ai éprouvé un peu de difficulté à déterminer si le trouble qu'appréhende l'intimé est suffisant pour nous justifier à ordonner un cautionnement.

La ligne de division tracée par la compagnie des terres a été adoptée et reconnue pendant longtemps, et ensuite trois ou quatre arpenteurs en nient la justesse. Cette incertitude quant à la ligne de division, et la longueur de la possession de l'intimé et de ses auteurs, m'ont fait douter s'il y avait juste sujet de craindre aucun trouble, mais vu que c'est une matière de discrétion, et que la Cour *a quo* a trouvé qu'il y avait lieu d'exiger un cautionnement, je ne me sens pas disposé à déranger ce jugement. Si la Cour avait décidé dans le sens opposé, je n'aurais probablement pas changé le jugement non plus. En matières discrétionnaires nous hésitons beaucoup avant de renverser le jugement d'une Cour de première instance.

Jugement confirmé (L'Hon. juge Ramsay, *diss.*)

L. C. Bélanger, pour l'appelant.

Panneton & Mulvena, pour l'intimé.

(E. L.)

December 17, 1883.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS and BABY, JJ.

LA COMPAGNIE DE NAVIGATION DU RICHELIEU & ONTARIO,

(*Defendant below*),

APPELLANT;

AND

CORDÉLIA ST. JEAN,

(*Plaintiff below*),

RESPONDENT.

Master and Servant—Injury sustained by servant—Responsibility of Employer—Fault.

HELD :—That where a servant meets with an accident while engaged in the ordinary duties of his employment, and the accident is not the result of any fault or negligence on the part of the employer or of those for whom he is responsible, the servant or his representatives has no right to recover damages from the employer.

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The action arose out of an accident which occurred on the River St. Lawrence, near Varennes, in 1881, by which Siméon Paulet, husband of the respondent, lost his life. Paulet was second officer on the steamer Chambly, one of the appellant's vessels. On the 29th July, 1881, the Chambly was going down the river, when it was hailed by a tug opposite Varennes. This tug was assisting a dredge which was engaged in dredging the channel in this part of the river. The tug came up and tied on to the Chambly in order to put on board the latter some empty boxes destined for Sorel. The work was about finished, and Paulet was in the act of drawing one of the boxes on board, when the two vessels suddenly separated; the box fell between them, and Paulet, losing his balance, was precipitated into the river. He supported himself in the water for some time, but finally sank and was drowned. He had been married about a month, and his widow brought the present action against the company, claiming $2,000 damages, charging negligence on the part of the captain of the Chambly, first, in not securing the two vessels more firmly together, and, secondly, in not promptly going to the succour of the drowning man.

The Court below (MATHIEU, J.) sustained the action, but taking into consideration that there had been some imprudence on the part of Paulet, reduced the damages to $500. The company appealed.

A. Germain, for the appellant:—

The evidence shows that the vessels separated, not because of the insufficiency of the single cable used, but because the rope was not properly secured on board the tug. Moreover, Paulet acted very imprudently in leaning over, although he must have noticed that the vessels were separating, and in spite of the warning of several persons on board. Paulet himself, as second officer, was responsible for the proper lashing together of the two vessels. The captain told him not to take away the side-rail, but he did so. He was the victim of his own carelessness. The second question is, whether the captain of

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the Chambly exerted himself sufficiently to rescue the drowning man. Some of the witnesses blame the captain for not throwing him a life-preserver, and for not getting out a boat. This would have made no difference, the steamer being down stream. The people on the tug threw him a pole and two ropes, but Paulet, probably being unconscious, did not use them. The Judge in the Court below was of opinion that Paulet probably might have been rescued by a boat, but it is submitted that the captain acted for the best. It is also submitted that the judgment of the Court below is erroneous in holding the employer liable for an accident arising from a risk incident to the employment in which the deceased was engaged.

T. Bertrand, for the respondent:—

Paulet was a young man between twenty and twenty-five, and inexperienced. The steamer was at the time in command of the captain, and it was the captain's duty to see that the vessels were properly secured together. The accident occurred by the rope breaking. Then, when Paulet was thrown into the stream, the captain lost time in approaching the spot, and when a rope was thrown to deceased it was too late; he sank to rise no more. The captain had lost his head, and adopted none of the means in his power to save the drowning man. Paulet was not to blame for the accident, but even if he had been imprudent the judgment is correct and is supported by the jurisprudence of this country.

TESSIER, J. (*diss.*):—

I am of opinion that the judgment should be confirmed. It seems to me to be a question of appreciation of testimony. The Court below was of opinion that there had been negligence on the part of the captain and absence of discipline among the persons on board; the means for saving people who might fall overboard were not at hand, as the law required; the boats were not ready to be launched, and there had been no practice in this necessary duty. I concur in this view, and I think that under the circumstances the judgment ought not to be disturbed.

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BABY, J.:—

Cette action est en recouvrement de dommages-intérêts de la part de la veuve du nommé Paulet qui a perdu la vie au service de l'appelante.

Voici l'historique de ce malheureux accident, telle que la preuve nous l'offre :

Le 29 juillet 1881, dans l'après-midi, le "Chambly," un des vapeurs de la compagnie-appelante, descendait le St-Laurent, lorsqu'arrivé vis-à-vis Varennes il s'approcha comme d'ordinaire d'un petit remorqueur, du nom de "*John Brown*," au service d'un cure-mole alors occupé à creuser le lit de la rivière en cet endroit. Le but de cet abordement était de prendre à bord un certain nombre de boîtes vides à destination de Sorel et que l'on rapportait ensuite remplies de provisions. Ce service s'effectuait par le "Chambly" depuis nombre d'années et il arrêtait ici, chaque semaine, une fois en descendant de Montréal et une autre en remontant vers cette cité.

Le mari de l'intimé était engagé sur le "Chambly" depuis 5 à 6 ans et, au jour en question, il y remplissait depuis quelque temps les fonctions de second ou contremaître. Les devoirs qui lui incombaient comme tel étaient de commander la manœuvre et de voir à la réception et à la livraison du fret sur le vapeur. Le "Chambly" s'étant donc rapproché du "John Brown," l'équipage du premier jeta une amarre sur le second où elle fut bien arrêtée, et l'on procéda, de suite, au transbordement des boîtes en question. Pendant ce temps, les deux vapeurs descendaient tranquillement au gré du courant. Contrairement aux ordres qui lui avaient déjà été donnés à cet égard, Paulet enleva la lisse supérieure du *gangway* ou passage de sortie et, quoique la chose ne fut pas de son ressort mais bien des matelots sous ses ordres, il se mit précipitamment à l'œuvre lui-même. Tenant d'une main l'échelle qui conduisait du premier pont au pont supérieur, de l'autre il recevait la boîte qu'il passait ensuite à un homme de l'équipage. Afin d'atteindre la boîte il se penchait complètement en dehors du vaisseau et cela au point que plusieurs, voyant le danger auquel il s'exposait

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ainsi, lui firent des représentations et le mirent en garde contre les conséquences sérieuses de son imprudence. Sa seule réponse fut " envoyez, envoyez toujours ! ! " On en était rendu à l'avant dernière boîte, les deux vaisseaux durant l'opération s'étaient graduellement quelque peu éloignés l'un de l'autre et Paulet n'en avait pas moins continué son travail. Le tour de la cinquième et dernière boîte étant arrivé, l'espace qui les séparait alors était déjà de plusieurs pieds, et les matelots sur le " John Brown " ayant tout à coup échappé cette boîte, Paulet qui la tenait déjà par une des poignées ne put résister à la secousse que cela lui imprima, perdit l'équilibre et, lâchant l'échelle ou entraîné sous le poids, il tomba à l'eau à la suite de la boîte. Plusieurs personnes avaient remarqué la conduite imprudente de Paulet et ne furent nullement surpris de ce qui arrivait.

Cependant, cet accident causa tout naturellement beaucoup d'excitation parmi ceux qui étaient sur les deux vaisseaux, et l'on courut en toute hâte en informer le capitaine Lamoureux qui, croyant toutes les boîtes mises à son bord, avait déjà donné le signal du départ. De suite, il fait arrêter son vapeur et donne l'ordre de renverser la machine afin d'aller au secours du malheureux, s'il en est encore temps. Le capitaine qui était à *ses cloches*, pour me servir de l'expression usitée, n'avait eu aucune connaissance de l'accident.

En tombant à l'eau Paulet disparut et fut entraîné par le courant; il revint à la surface de l'eau un instant après et, s'y étant maintenu quelques minutes, disparut ensuite pour ne plus reparaitre; il était noyé.

En voyant tomber cet homme à l'eau, le " John Brown " lâcha l'amarre du " Chambly " et se porta de reculons sur Paulet, deux autres chaloupes allèrent aussi immédiatement à son secours, mais le tout en vain. Le ".Chambly " demeura là encore quelque temps et son capitaine voyant qu'il n'y avait plus rien à faire, après avoir donné des instructions relativement aux recherches à être faites pour retrouver le corps du malheureux second de son bord, continua sa course ordinaire.

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Maintenant, la demanderesse-intimée dit en somme à l'appelante :

1o. Mon mari a péri par votre négligence. Vous deviez faire amarrer les deux vaisseaux mieux qu'ils ne l'étaient et, s'il est tombé à l'eau, à vous la faute.

2o. Dans tous les cas, une fois à l'eau, vous n'avez pas employé les moyens de sauvetage ordinaires pour le sauver de la mort—et vous me devez des dommages-intérêts à raison de l'état de détresse et de pauvreté dans lequel la privation soudaine de mon mari m'a jeté.

Sur le premier point, la preuve est tout à fait contre les prétentions de l'appelante. Paulet était contre-maître à bord du "Chambly" et la manœuvre était entièrement sous son contrôle et, si elle a été mal faite, il ne peut que s'imputer la chose—il a agi contrairement aux ordres du capitaine et il a fait preuve de la plus grande imprudence dans tous ses mouvements durant le travail qu'il s'était lui-même imposé.

Je conçois qu'il y ait des cas où le maître doit protéger son serviteur contre ses propres imprudences, savoir : lorsqu'il est mis en présence d'un ouvrage auquel il n'est pas habitué et qui peut offrir certains dangers, le maître doit mettre son serviteur sur ses gardes et lui faire connaître et le prémunir contre les périls auxquels il s'expose à raison de son ignorance ou son imprudence. Mais ici tel n'est pas le cas ; c'est un matelot de huit ans d'expérience et qui a vu faire ce travail tous les ans durant le temps de la navigation. Il était officier et ce travail ne lui incombait point, il était au contraire du ressort de ses subalternes. Cependant, il le fait lui-même, non pas tel qu'il se pratiquait ordinairement, puisque sa démarche imprudente et précipitée lui attire les observations des hommes d'expérience qui le voyaient faire, de ceux qui étaient dans l'habitude d'opérer le transbordement de ces choses d'un vapeur à l'autre. Il n'écoute pas non plus les bons conseils, les sages avis qui lui sont donnés par les personnes prudentes et expérimentées qui sont auprès de lui et parait ne pas s'en préoccuper le moins du monde. Aux uns il ne répond point et aux autres, demeurant tou-

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jours dans la position périlleuse qu'il aurait prise, il se contente de répondre "amenez, amenez toujours," semblant dire: cela ne vous regarde pas.

Sous ces circonstances, serait-il juste, raisonnable de faire tomber l'imprudence de la conduite de Paulet sur ses maîtres? Le jugement dont est appel admet l'imprudence de Paulet et, en conséquence, fait une diminution dans les dommages-intérêts qu'il accorde à sa veuve, mais il reproche à l'appelante, dans la personne du capitaine Lamoureux, de n'avoir point fait mettre les chaloupes du "Chambly" à l'eau pour aller porter secours à Paulet et par là n'avoir pas fait son possible pour sauver cet infortuné. C'est là le deuxième grief de l'intimée. Il peut y avoir eu là une erreur de jugement, mais non cette négligence qui fait condamner en dommages-intérêts celui qui s'en rend coupable. La majorité des témoins entendus, et les mieux renseignés, disent que la chose était parfaitement inutile sous les circonstances. En effet, il y avait là plusieurs embarcations qui se sont hâtées d'aller vers l'homme qui se noyait. Et elles étaient beaucoup plus en moyen de le faire, sur le champ, que ne l'auraient été les chaloupes du "Chambly," eussent-elles été mises à l'eau. Le "John Brown," un tout petit remorqueur, facile à conduire par conséquent, s'est assez rapproché de Paulet pour que de son pont on ait pu jeter à l'infortuné, par deux fois, une corde de sauvetage dont il ne fit, cependant, aucun cas et lui tendre une perche qu'il ne parut point même remarquer, quoique l'une et l'autre fussent à sa portée et l'aient même touché. Qu'il ait paru inhumain, cruel même aux yeux de certaines personnes, l'acte du capitaine Lamoureux qui n'a point fait descendre ses canots à l'eau pour aller au secours de cet homme qui se noyait, je le comprends. Il y a une foule de personnes qui, dans de tels cas, n'écoutent que leurs sentiments d'humanité, de philantrophie; elles font abstraction des circonstances dans lesquelles s'est produit l'accident et de celles qui l'entourent; elles perdent de vue ce qu'un capitaine doit aux autres personnes à son bord et elles viennent dire ce qu'elles auraient voulu voir faire dans l'occasion

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—c'est ce que plusieurs témoins de l'intimée ont fait. Selon eux, alors même que les embarcations auraient été inutilement descendues, du moins les convenances auraient été respectées ; ils sont révoltés aussi du fait que le vapeur " Chambly " ne soit pas demeuré plus longtemps sur le lieu du sinistre après la disparution de Paulet. Le capitaine n'a pas fait ce qu'il aurait dû faire, répètent-ils avec l'intimée.

En l'absence d'une criminelle indifférence vis-à-vis de ses matelots en danger le capitaine, sous de telles circonstances, ne saurait être responsable de ce qui leur arrive. Cet officier est le meilleur juge des moyens à employer pour effectuer un sauvetage. La responsabilité de sa position, son expérience des choses, son bon jugement le guideront, et dans le cas actuel nous ne voyons pas que le capitaine Lamoureux ait failli aux devoirs qui lui incombaient et comme officier et comme citoyen.

Sur le tout, la majorité de cette Cour en est venue aux mêmes conclusions auxquelles elle en est arrivée dans la cause *Desroches & Gauthier* (5 L. N. 404), et trouve que Paulet a été victime de sa propre imprudence et que sa veuve ne peut imputer aujourd'hui à l'appelante la triste position dans laquelle elle est demeurée, à raison du malheureux accident en question.

La Cour est donc d'opinion qu'il y a mal jugé par le jugement de première instance et l'infirmant, maintient l'appel avec dépens.

RAMSAY, J :—

This is an action of damages by the widow of a man employed on board of the Chambly, one of the appellants' steamers, and who was drowned while so employed, by the negligence, it is alleged, of the appellants. The judgment appealed from awarded the widow $500, and the reasons given for the judgment are that there was fault on the part of the appellants, and although there was perhaps also fault on the part of the deceased, " considérant que dans notre droit, lorsqu'il y a faute, imprudence ou négligence commune, la victime de l'accident

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qui a éprouvé un dommage ne peut être condamnée à le supporter seule, et qu' en ce cas le dommage doit être partagé entre ceux qui ont participé à la faute ou l'imprudence ou à la négligence," the widow was entitled to some damages. Another reason for the judgment was that the officers of the Chambly did not take measures to save the life of deceased by lowering boats, and that by neglecting to conform to the provision of the 37 Vict. cap. 30, sec. 2, they had probably lost the practice of lowering boats, and that there is a great probability that deceased's life might have been saved.

The immense difficulty of reducing the motives of judgments to perfectly logical "considérants," embracing all the findings of the Court in fact and law, is so great that it is an easy task to criticise them in almost every case. But without entering into minute criticism, which would be endless and unprofitable, it is our duty to examine and weigh the reasons which have led the Court below to its conclusion, and in doing so in this case I am constrained to say that I cannot concur with the the learned judge in the principles he invokes. In the first place, if Paulet lost his life by the failure to lower boats, and if the company is responsible for the officers of the Chambly not lowering the boats, then there is no reason for mitigating the damages, on account of the presumed-contributory negligence of Paulet. In the second place, the possibility of contributory negligence on the part of Paulet, was no ground for diminishing the damages to be awarded on account of his death. On the other hand, it is to be observed, that the great probability that the deceased's life might have been saved had boats been lowered from the Chambly, is no ground to support a judgment of damages. The disaster must be the direct and proximate effect of the culpable act. It is not sufficient to say that it is probably so.

Again, I cannot concur entirely in the statement of the law in the *considérant* above quoted in another respect. It is doubtless a general principle of the old law that every slight act of negligence on the part of the sufferer

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does not provide a protection for the flagrant wrong-doer; but in his discretion in awarding damages, the Judge mitigated them according to circumstances. As I understand it, the English law, although it expresses its rule in a somewhat more absolute form than the French law, really aimed at the same result. Both the English and the French law started from the principle, *volenti non fit injuria*. The negligence to be what is technically called "contributory," must be such negligence as essentially contributed to the disaster. I need not insist further on this point now, as in the case of *Desroches et al. & Gauthier*, reported in 5 Legal News, p. 404, there is an attempt to express fully my view on this point. Our code has attempted to introduce a system somewhat different. It says there is but one fault and one care. So that a man walking in Notre Dame street is to be as much on the alert as if he was on the edge of "Table Rock." Everybody knows this is absurd, and, as it is impossible to define *care*, the pragmatical innovation of the code has had but little effect.

Coming to the merits of this case, which has been swelled to the most extraordinary proportions (the evidence extends to about 200 printed pages), I find much time wasted on evidence as to the absence of efforts on the part of the officers of the Chambly to take any active steps to save Paulet's life. Failure to take proper precautions to save the life of a servant in jeopardy in consequence of the services he was rendering to his employer might be a ground of damages; but it would be necessary to prove that the man's death or the injury was caused by a culpable neglect, and I don't think the employer would be liable owing to evidence that something might have been done that was not done. It is certainly a little surprising that the people on board the Chambly did not at once lower a boat, from mere impulse, or as Charbonneau says, in better language than I can command, "suivant notre conscience je crois que c'est nécessaire qu'on fasse, au moins l'essai, et on doit pas même attendre après un autre." But the balance of the

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evidence shows that it would have been useless to do so in this case. Besides this, other means were being taken to rescue Paulet, which appeared to offer better chance of success, and the captain may very well have thought that confusion and danger would arise from a number of boats hurrying to the spot at once. The same excellent witness, Charbonneau, recognizes the discretion of the captain. He says:—"Il doit être juge de la position." I don't think therefore that the failure of the officers to lower a boat under the circumstances renders the company liable in damages.

The evidence adduced by plaintiff on the other point—that is, as to the negligence of the company in allowing their steamer to go alongside the John Brown for the purpose of transhipment, with only one hawser, is very slight indeed. It amounts to this: that it is very common to use one hawser, that the Chambly had been doing it almost every week that summer without difficulty, and that two hawsers or perhaps several would have been better. The test of negligence is not whether greater precautions might have been taken and the accident avoided, but whether ordinary precautions, those usual in the circumstances, were taken. Morasse, plaintiff's witness, is asked (p. 48): "Considérez-vous qu'il est prudent d'aborder deux batiments avec une seule amarre; surtout quand ils marchent doucement et qu'ils descendent le courant?" And he answers: "Ça se fait souvent. Mais je pense que ce serait plus prudent d'en mettre plusieurs. Plus il y a d'amarres, plus c'est prudent." Every sensible and conscientious witness would say exactly as Morasse, that the more the precautions taken the greater the prudence, but this just shows the unpractical nature of this sort of testimony. In addition to this, Paulet was the man in charge. It was his duty to take the necessary precautions, and if, with his eyes open, he did not take them, he cannot turn round and seek to throw his own fault—if fault there be—on the shoulders of another. Another of plaintiff's witnesses, Couvrette, at page 82, is asked: "Croyez-vous qu'il y a imprudence,

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puisque cela se fait généralement dans un cas où il n'y a que quelques effets à transborder et non de passagers ?" He answers : " Non, il n'y a pas d'imprudence dans ce cas là, s'il en résulte des malheurs c'est purement accidental et c'est un des risques de la navigation."

It seems to me that this simple bargeman has pointed out the true solution of the question. I think there was no fault on the part of the captain, and I can see none on the part of Paulet. He perished accidentally in endeavoring zealously to perform his duty towards his employers, and for the loss his family has sustained the finite powers of the law afford no remedy. I am to reverse.

DORION, C. J. :—

I concur. Paulet was second officer of the steamer, and it was his duty to see that the vessels were properly fastened together. The captain seems to have done all that could be expected to save the life of Paulet. He did not succeed, but the company cannot be made responsible.

The following is the judgment of the Court :—

" La Cour, etc.

" Considérant que l'intimée n'a pas prouvé les allégués essentiels de sa déclaration et notamment que son mari feu Siméon Paulet ait perdu la vie par la faute et la négligence de la compagnie appelante ou de ses employés, mais qu'au contraire il appert par la preuve que le dit Siméon Paulet s'est noyé par un pur accident auquel il était exposé par suite des devoirs qu'il avait à remplir à bord du Chambly, l'un des vaisseaux de l'appelante ;

" Et considérant qu'il y a erreur dans le jugement rendu par la cour supérieure siégeant à Montréal le 30me jour de juin 1882 ;

" Cette Cour casse et annule le dit jugement du 30me jour de juin 1882, et procédant à rendre le jugement qu'aurait du rendre la dite Cour de première instance, renvoie l'action de l'intimée avec dépens," etc. (*Dissentiente*, l'Hon. Juge Tessier.)

A. Germain, attorney for appellant.

T. Bertrand, attorney for respondent.

(J. K.)

May 27, 1884.

Coram DORION, C.J., RAMSAY, TESSIER, CROSS, BABY, JJ.

JAMES McSHANE, THE YOUNGER,
(*Defendant below*),
APPELLANT;

AND

THOMAS HENDERSON ET AL.,
(*Plaintiffs below*),
RESPONDENT.

Charter-party—Time—Rejection of Contract.

The appellant, in January, 1879, agreed to charter a steamship, for the carriage of live cattle to England, and the conditions of the charter-party were that the steamship should proceed to Montreal with all convenient speed to arrive there 'between' the opening of navigation in 1879, and thereafter to run regularly between Montreal and London, and to be dispatched from Montreal in regular rotation with other steamers to be chartered up to 1st October, 1879. Navigation opened at Montreal about 1st May, but the steamship did not arrive there until 5th June when the appellant refused to load.

Held, that there was not a substantial compliance with the contract on the part of the ship, and that the appellant was entitled to throw up the charter-party.

The appeal was from a judgment of the Superior Court, Montreal (JOHNSON, J.), 31 May, 1882, maintaining the respondents' action. The judgment was in the following terms:—

"The Court, etc...

"Considering that this action is brought to recover from the defendant $4,132.80 for dead freight, due in respect of the ship 'Emblehope' of which the plaintiffs are owners, under a charter-party between the plaintiffs and defendant in the declaration set forth;

"Considering that the defendant has pleaded several pleas, all of which were abandoned at the argument except the fourth, by which it is alleged that the contract between the parties stipulated for the arrival of the said ship at the port of Montreal, at the opening of the navi-

gation of 1879, and that she did not so arrive, and consequently the plaintiffs have no right of action;

"Considering that the said last-mentioned plea is not proved, and that the said charter-party did not stipulate for the arrival of the said ship at the port of Montreal at the opening of navigation, but that it was to arrive between the opening of navigation, 1879, and thereafter to run regularly and with dispatch between Montreal and London, and to be dispatched from Montreal in regular rotation with other steamers under charter to the same charterers, by different owners, and that the evidence shows that the said ship arrived at Montreal on the 5th of June, and in sufficient time, according to the evident meaning and intent of the parties to the said contract;

"Doth dismiss all the pleas of the defendant;

"And considering that plaintiffs have proved the allegations of their declaration, doth for the causes, matters and things in said declaration set forth, adjudge and condemn the said defendant to pay and satisfy to said plaintiffs the said sum of $4,132.80," etc. (1).

W. H. Kerr, Q.C., for the appellant.

H. Abbott, for the respondents.

CROSS, J.:—

The respondents, as owners of the steamship 'Emblehope', bring an action against the appellant for violation of a charter entered into at Glasgow, in Scotland, in January, 1879, for the employment of that vessel between the ports of Montreal, in Canada, and London, in England, during the navigation season of 1879. The action is for what is called dead freight, for the appellant having refused to load the vessel pursuant to the charter.

The appellant meets the action by a number of pleas, only two of which, the fourth and last, are seriously urged, the rest being abandoned.

By the fourth plea, the appellant alleged that, by the terms of the charter-party, the 'Emblehope' was to arrive

(1) The text of the observations made by the learned judge in pronouncing judgment will be found in 5th Legal News, p. 196.

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at the port of Montreal, at the opening of the navigation, 1879, which took place about the usual time, viz, the first of May of that year, and that she only arrived on the 5th of June; by which delay, the appellant was freed from liability and entitled to rescind the contract, which he elected to do and threw up the charter.

The last plea was a *défense en fait*.

The 'Emblehope' only sailed from Barrow, in England, on the 21st May, 1879; the 31st May is mentioned in the evidence, but that is supposed to be a mistake. She arrived at the port of Montreal on the 5th of June, and on the 6th notified McShane of her readiness to receive cargo, and protested on his refusal to comply with her demand. The master thereupon procured cargo at a lower rate of freight, and the present action was by the owners to recover $4,132.80, loss of profits on her first voyage within the time specified in the charter.

The material provisions of the charter-party were, that the ship should with all convenient speed sail and proceed to Montreal to arrive there *between* opening of navigation, 1879, and thereafter run regularly with all dispatch between Montreal and London, to be dispatched from Montreal in regular rotation with other steamers under charter to same charterer up to 1st October, 1879. In charterer's option, one week interval may take place between the sailing of each steamer from Montreal, and there load a full and complete cargo of live cattle, as many as the vessel can carry; which cargo the said merchant McShane hereby engages to ship, and being so loaded, shall therewith proceed to London and deliver the same immediately on arrival, freight for the same being paid at the rate of £6 stg. per head on all cattle shipped up to 1st of August, and £5 stg. per head on all shipped between that date and 1st October. Penalty for non-performance to be the estimated amount of freight.

It is to be observed that no time is mentioned when the vessel should sail from England, but from the date of the charter to the time when she was to reach Montreal, ample time is allowed and no reasonable excuse could be

urged for her not reaching Montreal within the delay agreed upon, if the time for that purpose is made certain. Speculation might doubtless have been indulged in as to the correct meaning of the charter as regards this date, had the respondents themselves not attached to the expression what seems to have been the true meaning of the parties. The term "between" has been inadvertently used as if the writer had intended to specify two dates, but it seemed to have immediately occurred to the writer that the opening of navigation could not be easily placed between two specific dates. The intention to give two specific dates with an interval of space between was consequently abandoned, and the writer proceeded to fill in the words intended to govern, namely, " the opening of navigation," without attending to the propriety, if not necessity, of striking out the word *between;* the respondents consequently, in their declaration, adopted the reasonable sense of its meaning " *about the opening of the navigation,*" which interpretation was accepted by the appellants. There was therefore a time understood to be fixed and that was about the opening of navigation, which opening of navigation occurred on the first of May, 1879, a customary date for that event. The vessel was therefore to make her way with all convenient speed from her port in England to the port of Montreal, but to be there about the first of May. As there was no excuse for the exercise of convenient speed from England to Montreal, and abundance of time for the purpose, she ought to have been at the port of Montreal about the first of May, 1879: and, as the charter would indicate that other steamers were chartered to establish something like a weekly line, about the first of May could not be reasonably extended beyond the first week in May, if it could so far as that. Nor is there room for the contention of the respondents that the other vessels chartered by McShane may have arrived within sufficient time to begin the weekly service. We have not their charters to establish whether a like time or any time was fixed for their arrival at Montreal, and it is to the charter of the 'Emblehope' we have to look to fix the obligations of the

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parties as regards the contention in this suit, and by that charter the respondents bound themselves to have the vessel at the port of Montreal about the first of May, 1879, and the appellant was entitled to depend upon this vessel as the first of the series, or even to have her at the same time as the others, if the charters were similar to the present.

It is proved that he had cargo for her and that he employed other vessels to carry it. It is quite true the proof shews that freights had fallen, and vessels were obtainable at lower rates, but although this may be a reason for the exercise of a careful scrutiny to see that appellant does not unfairly take advantage of this circumstance, it does not affect the legal question as to whether the appellant had a right to rescind the contract for failure on the part of the ship to keep the time agreed upon.

The Superior Court were of opinion that the appellant had no right under the circumstances to throw up the charter, and that his recourse, if any, was to claim damages for the delay.

On an examination of the authorities cited by the appellant, we find that in England where the subject has undergone careful investigation, although there is some confusion in the opinions expressed in the different cases, the general result seems to be well given in 'Maclachlan on Shipping', 3rd Edition, p. 262. He says: "Questions upon the construction of this instrument have frequently been raised on the assumption that of two things reciprocally stipulated in it to be done, performance of the one is dependent on performance of the other, in the nature of a condition precedent. But whether that is so, stands not on any formal arrangement of the words, but on the reason and sense of the thing, as these are to be collected from the whole of the contract taken together. The rule was well laid down by Lord Mansfield in *Boone* v. *Eyre*, that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the covenant to

recover damages for the breach of it; but it is not a condition precedent.

On this principle, he concludes that a representation although contained in the written instrument itself, and although false, is not such as to break the contract, unless made fraudulently. A question, however, he says, may arise as to whether a descriptive statement in a written instrument is a mere representation, or whether it is a substantive part of the contract. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of the contract and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent or only an independent agreement, a breach of which will not justify a repudiation of the contract, but only be a cause of action for compensation in damages.

In the construction of charter-parties, this question has often been raised with reference to stipulations that some future thing should be done or shall happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail or be ready to receive a cargo on or before a given day, has been held to be a condition, in support of which he cites *Glaholm* v. *Hays*, and several other cases, while, he says, a stipulation that she shall sail with all convenient speed, or within a reasonable time has been held to be only an agreement, to support which he also cites a number of cases.

And with regard to statements descriptive of the subject matter or of a material incident, such a statement, if intended to be a substantive part of the contract, is regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party, may, if he be so minded, repudiate the contract *in toto* and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition and becomes a warranty in the narrow

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sense of the word, namely, a stipulation by way of agreement for the breach of which a compensation must be sought in damages. That the Court may be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which and the purposes for which the charter-party was entered into; so if it were shewn that the charter-party was made for a purpose such as, that unless the vessel began her voyage from the port of loading with a cargo on board by a certain time, it was manifest that the object of the charter-party would, in all probability, be frustrated; the Court might properly be led by these circumstances to conclude that a statement as to the locality of the ship, coupled with the stipulation that she should sail with all convenient speed, was a warranty of her then locality.

Again, at p. 372, where time is specified and both parties contract with regard to it, whether it be the time at which the vessel is to be ready to receive cargo, or the day of sailing or of arrival outwards, or the day of any other event in the voyage, the Courts hold that it is in the nature of a condition precedent to the rights of the owner under the rest of the charter-party. And citing with approval the case of *Glaholm* v. *Hays*, where the charter contained a stipulation that the vessel was to sail from England on or before the 4th of February, and failed to comply with the stipulation, it was held to be a condition precedent, and in reporting the opinion of Chief Justice Tindal, he gives as part of the language used by him in this case, "the performance of the stipulation goes more to the very root of the whole consideration of the contract."

The subject is further discussed by Maclachlan leading to the concession, that even where the stipulation was to proceed with all convenient speed, it might be held to be a condition precedent, if it were evident that the object of the charter had been frustrated by the failure of the vessel to do reasonable diligence, but it is clearly laid down that where the charterer has accepted part performance he cannot afterwards repudiate the entire contract.

A principle deducible from the different cases may be safely assumed to go so far as to hold that where the stipulation as to time is of the essence of the contract, it will be considered a condition precedent, or a condition on the failure of performance of which by the ship, the charterer is entitled to repudiate the whole contract, but if he accepts part performance of it, he cannot afterwards repudiate the entirety of it, and must, if he have any grievance, confine himself to a demand in damages for the delay only. This is perfectly consistent with the principles stated by Pothier, Demolombe, and our own Civil Code. The case of *Tully* v. *Howling*, cited by the appellant from L. R. Q. B. Division, vol. 2, p. 182, very much resembles the present. The plaintiff agreed to charter a ship for twelve months after the completion of her then present voyage. She was detained as unseaworthy and the repairs were not finished until more than two months after the completion of the voyage. It was held in Appeal affirming the decision of the Queen's Bench Division, that the plaintiff was entitled to throw up the charter party.

In the case of *Dimech* v. *Corlett*, 12 Moore's Privy Council Reports, p. 199, the Privy Council seemed to be of opinion that the charterer ought to have provided for his own protection by a stipulation that unless the ship sailed on a specified day, the charter was to be at an end. This does not seem to have been held imperative in all cases, nor to have been adopted as an absolute general rule in that decision, and clearly has not been required in other cases.

In the present case it was peculiarly important that the vessel should have kept her time of arrival at Montreal. The live cattle which were to compose her cargo were a very expensive asset to hold over and exposed to serious deterioration, and the charterer had a strong interest in a prompt fulfilment by the vessel of the special undertaking in question, viz, to have the vessel at the port of Montreal about the opening of the navigation. We think that the judgment of the Superior Court holding the charterer liable for the freight is wrong, and we reverse that judgment and dismiss the action with costs.

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RAMSAY, J. :—

This is an action brought by respondents against the appellant on a charter-party by which respondents undertook to send their s.s. "Emblehope" to arrive in Montreal "between opening of navigation 1879" (probably between the execution of the charter-party and the opening of the navigation 1879 is meant), and to form one of a number of steamships, not exceeding five, which the charterer intended to run in regular rotation between Montreal and London up to the 1st October, 1879. The "Emblehope" did not sail from England till the 21st May, and she did not arrive in Montreal till the 5th June. The appellant refused to provide her with cargo, the owners' agent obtained cargo at a loss, and an action was brought for the difference between the freight the steamship should have earned under the charter-party and what she did earn, namely, for $4,132.80.

The appellant contends that the charter-party was a time charter-party and not for a voyage, that she was to be at disposal of the charterer on the opening of the navigation, that this is a specific engagement, the legal effect of which is to oblige the promiser to execute it, and in case of failure, allows the other party to repudiate the contract altogether.

The respondents do not seem to combat this proposition in the abstract, but they contend that a promise to arrive at the opening of the navigation is substantially complied with by an arrival on the 5th of June, that the appellant did not repudiate the contract on this ground, but put forth a reason in answer to the demand of cargo which has been abandoned at the argument as untenable, that the contract was not frustrated and that the only object of defendant was to get out of his bargain.

There is no contest as to facts, and it will therefore be at once seen that the merits of the appeal turn entirely on the question as to whether a charterer can repudiate his bargain, from a failure to keep to a specified time, and whether a delay of a month and five days is within the latitude which evidently attaches to an uncertain date.

The first thing we have to look at is the contract itself. In January, the owners specially declared that their vessel was seaworthy, and they promised that their vessel should "with all convenient speed sail and proceed to Montreal, to arrive there between (that is between that time and the) opening of navigation 1879." The object of the charter-party was that the vessel should "thereafter run regularly and with all despatch between Montreal and London, to be despatched from Montreal in regular rotation with other steamers under charter to same charterer up to 1st October, 1879."

We have then a distinct undertaking as to time of arrival and a comprehensible object for a substantial compliance with the stipulation. Is there such compliance, or has the plaintiff inexcusably violated his agreement?

The evidence seems to me to render the answers to these questions simple. The navigation opened on the 24th April in 1879. The first steamer arrived in Montreal on the 1st of May, and sea-going vessels generally begin to arrive from the 1st to the 8th of May. The "Emblehope" did not sail from England till the 21st May and she did not arrive till the 5th June. It seems to me that this is a voluntary disregard of the contract which would give the charterer the right to repudiate the contract. This is according to the ordinary doctrine of the civil law, and commercial law so far contains no exception.

But it is said the excuse is trumped up; you renounced the contract four months ago and you refused to carry out the contract on another ground. If this is a legal answer at all in the mouth of respondent it is as an acquiescence; but it is evidently an acquiescence in respondents' abandonment of the whole contract, not in his fulfilling it inexactly. I am to reverse.

DORION, C.J.:—

I think this case must be governed by *Tully* v. *Howling*. I therefore concur in reversing the judgment appealed from.

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The judgment in appeal is as follows:—

" The Court, etc...

" Considering that by the charter-party mentioned, and in part recited, in the declaration filed by the respondents in this cause, said charter-party bearing date in the month of January, 1879, the respondents, in effect, undertook that their steamship or vessel called the " Emblehope " should, with all convenient speed, proceed to Montreal to arrive there about the time of the opening of navigation, to wit, about the 1st day of May, 1879, and there load from the factors of the appellant a full and complete cargo of live cattle, which the appellant was to furnish and to pay freight for the carriage of the same, at the rates specified in the said charter-party;

" And considering that the respondents failed to cause their said steamship or vessel called the " Emblehope " to proceed with convenient speed or to arrive at the said port of Montreal on or about the said 1st day of May, 1879, and, in fact, failed to have the said steamship or vessel arrive at the said port of Montreal until the 5th day of June, 1879, and did not notify the appellant of such arrival nor demand cargo of him until the 6th of June, 1879, when the appellant refused to load the said steamship or vessel, or to be bound by the said charter-party, and claimed to rescind and void the same, as he had a right to do;

" And considering that in the judgment rendered in this cause by the Superior Court at Montreal, on the 31st day of May, 1882, there is error, the Court doth reverse, etc., and doth dismiss the action of the respondents with costs."

Judgment reversed.

Kerr & Carter, attorneys for appellant.

Abbott, Tait & Abbotts, attorneys for respondents.

(J.K.)

September 22, 1884.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

WILLIAM F. LIGHTHALL,

(*Plaintiff below*),

APPELLANT;

AND

GEORGE W. CRAIG,

(*Mis en cause below*),

RESPONDENT.

Contract—Rescission for fraud—Rights of innocent third party.

HELD:—That the rescission, on the ground of fraud, of a deed transferring real estate, will not affect the rights of a third party who in good faith has lent money on the property while in the possession of the purchaser, where the vendor, by his own act or fault, has to some extent, induced the third party to make the advance. So, where the plaintiff sold certain real estate to defendant (who then obtained an advance from C. on the security of the property), and in the deed from plaintiff to defendant, it was declared that the consideration was cash paid by the purchaser, whereas in fact the consideration was mining stock which turned out to be worthless, it was *held* that the plaintiff was in fault in permitting and requesting such misstatement as to the consideration to be inserted in the deed, which misstatement might to some extent have induced C. to advance money on the property; and therefore the plaintiff was entitled to obtain the rescission of the deed for fraud, only *on condition of his reimbursing to C. the amount of his advance.*

The appeal was from a judgment of the Court of Review, Montreal, 31st January, 1883, (PAPINEAU, JETTÉ, LORANGER, JJ.), reforming a judgment of the Superior Court, Montreal, 9th May, 1882, (MATHIEU, J.).

The appellant Lighthall sold certain real estate to one Chrétien, and the price was paid in part with Silver Plume Mining company stock, but in the deed the price was represented to have been paid in cash. Chrétien transferred the same property to George W. Craig, the respondent, by way of security for an advance of $1500. The price of Silver Plume stock, by fraudulent methods, had been forced up to a figure far exceeding its value, and the appellant, discovering that the shares were really worth-

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less, protested the parties, and asked for the return of his property by the present action. Mr. Justice Mathieu, in the Superior Court, maintained the demand, set aside the sale to Chrétien and the transfer to Craig, and condemned Chrétien and Craig to give the property back to the appellant. The case was then taken by Craig to the Court of Review, where the judgment was modified. The following was the judgment in Review, from which the present appeal was instituted :—

" La Cour, après avoir entendu la plaidoirie contradictoire des avocats du demandeur et du mis en cause sur le mérite de la demande faite par ce dernier, que le jugement de la Cour Supérieure de ce district, rendu le 9 de mai 1882 et annulant :

" 1. L'acte de vente par le demandeur au défendeur, en date du 21 juillet, 1880 et ;

" 2. L'acte de cession par le défendeur au mis en cause en date du 20 septembre 1880, soit révisé, et que le dit jugement soit réformé quant à ce qui l'affecte ; avoir pris connaissance des écritures des parties faites pour l'instruction de leur cause, des pièces produites et de la preuve et délibéré ;

" Considérant, que par le dit jugement du 9 de mai 1882, la vente par le demandeur au défendeur, de l'immeuble suivant, savoir : ' Un emplacement, etc.' est déclarée nulle et annulée à toutes fins que de droit, et ce à raison du dol pratiqué par le défendeur et son agent pour faire consentir le demandeur au dit acte ;

" Considérant que le dit jugement annule en outre la cession faite ensuite du même immeuble par le défendeur au mis en cause le 20 septembre 1880, et ce comme conséquence nécessaire de l'annulation du premier titre, le défendeur n'ayant pu transférer au mis en cause plus de droit au dit immeuble qu'il n'en avait lui-même ;

" Considérant que si en principe la doctrine ainsi énoncée au jugement maintenant soumis à la révision de cette Cour ne saurait être contestée, les circonstances établies dans l'espèce ne permettent pas cependant d'en faire l'application rigoureuse au mis en cause ;

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" Considérant notamment qu'il est en preuve qu'avant de vendre à Chrétien le demandeur a été informé du fait que la compagnie connue sous le nom de *Silver Plume Mining Company* n'était pas incorporée : que ce n'était qu'une association volontaire de certaines personnes possédant une propriété minière, et qui se proposaient de demander une charte d'incorporation ; que le capital nominal de cette compagnie avait été divisé en actions imaginaires, en attendant cette incorporation et que malgré les cotes avantageuses des dites actions à la bourse, il était fort imprudent et risqué de faire aucune opération ayant pour but l'acquisition des dites actions ;

" Considérant que malgré ces renseignements le demandeur a persisté à vendre l'immeuble susdit, et à recevoir en payement de la plus forte partie du prix des actions de la dite compagnie ;

" Considérant que bien que la cote la plus élevée des dites actions n'eut pas dépassé le chiffre de 72½ centins dans la piastre, le demandeur a consenti à accepter ces actions au pair, et qu'au lieu de déclarer dans l'acte de vente par lui consenti à Chrétien que telle était la considération de la dite vente, le demandeur a spécialement requis le notaire de n'en faire aucune mention et de déclarer au contraire que la somme représentée par les dites actions lui avait été payée à sa satisfaction ;

" Considérant qu'en agissant ainsi le demandeur s'est rendu coupable de faute et a volontairement contribué à induire en erreur les tiers de bonne foi, à qui l'acquéreur Chrétien pouvait ensuite s'adresser ;

" Considérant que de fait Craig, ignorant les manœuvres frauduleuses employées à l'encontre du demandeur, a ensuite avancé de bonne foi une somme de $1500 sur la garantie de l'immeuble ainsi vendu par le demandeur à Chrétien, et que par ses défenses à l'action du demandeur il soutient entre autres choses, que les actes dont le demandeur se plaint ne sauraient dans tous les cas être annulés, sans que ses intérêts au sujet de la garantie à lui assurée soient sauvegardés ;

" Vû l'article 1053 du Code Civil, cette Cour accueillant

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le pourvoi en révision du dit Craig, pour autant, réforme le dit jugement du 9 de mai 1882, et tout en maintenant l'annulation prononcée par icelui de la vente ou cession du 20 septembre 1880, par Chrétien à Craig, déclare que le dit demandeur ne reprendra néanmoins le dit immeuble que sujet au paiement de la somme de $1500 due à Craig, sur icelui, mais subsidiairement et après épuisement du recours assuré à Craig sur l'autre immeuble affecté au paiement de sa dite créance;

" Et la Cour condamne le demandeur aux frais de révision, distraits à messieurs Lunn et Cramp, avocats du mis en cause, chacune des dites parties devant payer ses frais en Cour de première instance."

Barnard, Q.C., for the appellant.

A. H. Lunn and *G. B. Cramp, Q.C.*, for the respondent.

The judgment in appeal was delivered by

RAMSAY, J.:—

The appellant, owner of certain real estate, was induced by fraud to make it over to other persons in exchange for worthless stock. The deed between appellant and these parties did not exactly disclose the real transaction, for by the deed appellant gave the parties acquiring the property a full receipt as if he had been paid in money. When appellant found out how he had been practised upon, he brought an action to rescind the deed. In the meantime, however, the purchaser had hypothecated the property for $1500, and the hypothecary creditor, now respondent, was put into the suit. He pleaded that appellant was not defrauded, and he added that even if he had been so, he, Craig, was not responsible for it, and that his hypothec must be paid before Lighthall could be allowed to take possession.

In the Court of first instance the deed was rescinded, as having been obtained by fraud from Lighthall, and the contention of the *mis en cause* was set aside on the principle that what was null could produce no effect.

Craig took the case to review, and there the Court reversed the judgment on the principle that Lighthall

was in fault for he had thrown the *mis en cause* off his guard by declaring that he had been paid, and that if this had been true Craig would not have suffered.

We are all of opinion that the decision of the Court of Review is correct, and that it must be maintained; but so far as I am concerned I think the judgment is sustainable upon deeper reasons than those assigned by the Court of Review. The deed between appellant and the purchasers is set aside for a cause of nullity in the contract (991 C. C.). It is not said in the code, and indeed it has never been pretended in any system of law, that contracts were null by reason of error or fraud. They may be annulled therefor, that is all. (1000 C. C.) They affect the results of consent, they do not destroy it. In jurisprudence this has never been a difficulty, although the use of the word "consent" has sometimes made it appear hazy. The Germans have got over this inconvenience by a periphrase—the consent which is of the essence of a contract is termed "a declaration of will." Without a declaration of will there is no consent, and therefore no contract. With it the contract is complete, and so long as it is allowed to subsist, it is binding. It is a title to the ordinary prescription of ten years; nay more, it has a special prescription of its own. (2258 C.C.) At the argument the learned counsel for the appellant said that if this be true, for error or fraud, it must be equally so for violence and fear. This is perfectly true, but if it were admitted without a caution, it might very readily be so exaggerated as to lead to the neglect of substantial distinctions. It would however be necessary to make a very long digression to discuss this matter fully, and therefore I shall confine myself to one or two remarks. Art. 991 C. C. differs from art. 1109 C. N. in several particulars but specially in the addition of the word "fear." Now I do not attach any significance to this addition. It was not intended to augment the extent of violence but to prevent its too narrow interpretation. It intimates authoritatively that a menace enforced with the power to execute it is violence, just on the same principle that a menace to strike within the distance in which the threat can be

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executed is an assault. On the other hand it is possible to conceive acts of violence of such a character as to introduce other principles, such as for instance when a strong man forced the hand of a weaker person to hold the pen that signed the deed. There might not then be even a declaration of will, and consequently no contract. But as cases of that sort are not likely to arise, and if any such arose would be easy of solution, it is not necessary to consider them more at length. I agree therefore with counsel that within the meaning of arts. 991 and 1000 C. C. the four causes of nullity therein mentioned stand on the same footing. It was also argued that there was a period of ten years in which the deed granted by error, &c., could be set aside. Manifestly that is as against the other contracting party. It has no effect on third parties.

Judgment confirmed.

Barnard, Beauchamp & Doucet, attorneys for appellant.

Lunn & Cramp, attorneys for respondent.

(J. K.)

January 21, 1885.

Coram DORION, C.J., RAMSAY, TESSIER, CROSS, BABY, JJ.

ROSS,

(*Defendant below*,)

APPELLANT;

AND

LANGLOIS,

(*Plaintiff below*,)

RESPONDENT.

Master and servant—Responsibility of employer for accident resulting from defects in machinery—Negligence of laborer.

HELD:—1. An employer is responsible for injuries to his employees resulting from defects in the tackle, machinery or appliances provided for their use. Tackle used in work such as loading or unloading a vessel ought to be amply sufficient to withstand any strain that is likely to be put upon it by ordinary unskilled laborers; and where tackle breaks, without any extraordinary strain upon it, it will be presumed to be insufficient, though it may have been used previously for the same purpose without accident.

2. A laborer engaged in work such as loading or unloading a vessel is only bound to use ordinary care, and the employer is not relieved from responsibility by showing that if the laborer had used the greatest skill and care the accident might not have happened.

Appeal from judgment of the Superior Court, Montreal, March 24, 1883, (JETTÉ, J.)

The action was to recover the sum of $200 damages for bodily injuries. While the plaintiff Langlois was assisting in unloading the steamer Polino of a cargo of coal an iron hook broke and the tub suspended by it fell upon him. He claimed $80 for loss of time and doctor's bill, and $120 for his suffering and injuries, making $200 in all.

The defence was that the hook was sufficiently strong for the purpose, and that the plaintiff had been careless. That it was his duty to stand upon the platform near the top of the slide, and when the bucket came up filled with coal, to receive it and to empty the coal in the bucket into the slide at the top, leaving the bucket free to descend into the hold, and preventing it from sliding down the slide, but allowing the coal to slide down into the carts. That while the plaintiff was thus engaged, instead of causing the bucket of coal to be emptied at the top of the slide, he negligently allowed it, when full of coals, to descend down the slide to the lower end, and thus an unusual and extraordinary strain was put upon the apparatus holding the end of the slide suspended, and the iron hook above referred to broke, and the gaff fell, together with the tackle appertaining thereto, and struck the platform upon which the plaintiff was standing, breaking it and throwing him down on the deck.

The court below (JETTÉ, J.) was of opinion that the hook was insufficient for the weight, and condemned the defendant, who is the owner of the Polino, to pay the sum demanded.

The following was the judgment appealed from :—

" La Cour, etc.

"Considérant que le demandeur réclame du défendeur en sa qualité de propriétaire du steamer "Polino" des dommages s'élevant à deux cents piastres et résultant d'un

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accident grave arrivé au dit demandeur le 26 juin dernier (1882) dans le port de Montréal, pendant qu'il était employé au déchargement du dit navire, le dit demandeur ayant alors été, par suite de la rupture d'un crochet en fer soutenant, au moyen d'une barre en bois et d'un cable, une glissoire destinée à conduire le charbon du port du dit navire aux voitures placées sur le quais, frappé par la chute de la dite barre en bois et du dit crochet en fer, et ramassé sur le pont sans connaissance et blessé grièvement, ce qui l'a retenu au lit pendant plusieurs semaines, et lui a causé les dits dommages : le demandeur alléguant en outre que le dit accident est arrivé par la faute du défendeur et à raison de la mauvaise qualité et condition des appareils du dit navire employés comme susdit à son déchargement ;

" Considérant que le dit défendeur Ross, plaide en substance à cette action que c'est par la faute et négligence du demandeur que l'accident en question est arrivé, attendu que le devoir du demandeur dans l'exécution de l'ouvrage à lui confié était de prendre soin de ne verser le contenu de la cuve apportant le charbon de l'intérieur du navire qu'à une hauteur raisonnable de la glissoire susmentionnée et que néanmoins, lors de l'accident, le demandeur et son compagnon de travail avaient laissé monter la dite cuve de charbon à une hauteur beaucoup trop considérable, puis l'ont laisser retomber brusquement sur la glissoire, à l'extrémité d'icelle soutenue par le cable et le crochet en question, et que c'est par suite du choc violent qui est résulté de cette fausse manœuvre que le crochet s'est rompu,mais nullement parce qu'il était de mauvaise qualité ou insuffisant, le dit crochet ayant, au contraire servi déjà depuis longtemps et résisté à une charge et pression beaucoup plus forte que celle du poids du dit charbon, si aucune brusque secousse n'y avait été ajoutée. Qu'en outre, en s'engageant pour cette ouvrage, le demandeur a pris sur lui les risques inhérents à tel emploi et que l'accident qui lui est arrivé n'est que le résultat de tels risques ; Qu'en conséquence le défendeur n'est pas responsable des dommages réclamés ;

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"Considerant, qu'il résulte de la preuve faite que le crochet en fer et qui servait à soutenir la glissoire sur laquelle se déchargeait le charbon lors de l'accident en question était de mauvaise qualité, en mauvaise état et insuffisant pour supporter sans danger le poids du charbon ainsi déchargé ; et que l'état du dit crochet n'a pas été constaté avant de l'employer à l'usage sus-dit ;

"Considérant, que même en supposant que le demandeur, en l'occasion en question, aurait laissé tomber le charbon sur la glissoire de deux ou trois pieds plus haut que d'habitude, il n'y a pas là, faute du demandeur pouvant impliquer responsabilité, mais qu'au contraire, il était du devoir du propriétaire du navire et de ses employés en charge d'icelui de prévoir une circonstance d'une occurrence aussi ordinaire et aussi fréquente et d'y supplier par l'emploi d'appareils d'une force suffisante pour résister au poids additionnel en résultant ;

" Considérant que le demandeur ne peut être censé avoir pris sur lui les risques résultant des circonstances sus-mentionnées, et que la responsabilité du dit accident repose en conséquence entièrement sur le défendeur ;

" Considérant, que le demandeur a établi les dommages par lui soufferts par suite de perte de temps et de travail et frais de médecin à la somme de quatre-vingt piastres et qu'il est, en outre en droit de réclamer cette addition de cent-vingt piastres pour les souffrances par lui endurées et le tort à lui causé ; ces deux sommes formant réunis celle de deux cent piastres courant ;

" Renvoie l'exception et défense du défendeur et le condamne à payer au demandeur la dite somme de deux cent piastres courant, avec intérêt," etc.

Tait, Q. C., for appellant.

Geoffrion, Q. C., and *O. Gaudet*, for respondent.

CROSS, J. (*diss.*) :—

This is an action of damages by the respondent Langlois, a labourer, for personal injury sustained by him in consequence of the giving way of the tackle employed for

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the discharge of a cargo of coal from the steamer Polino in the Port of Montreal on the 26th of June, 1882.

The action is directed against Ross as the proprietor of the Steamer, and against the brothers Brown, the stevedores, who had charge of the unloading of the vessel.

It is alleged that the respondent was seriously injured by the fault and negligence of Ross and by the insufficiency of the tackle furnished by him for unloading the vessel, for which injury Langlois claimed and has been awarded $200.

Ross pleaded that the coal was discharged in the usual manner specially explained in the plea, and which will be noticed in referring to the proof; that the accident whereby the respondent was injured resulted from his own carelessness and failure of duty; that he had in fact taken the risk of the employment and himself been the author of the injury received.

The respondent examined three witnesses, his father and two other laborers who had all been employed by the stevedores in discharging the coal from the Steamer.

The appellant on his part examined four witnesses.

It appears by the evidence that the manner in which the coal was discharged was as follows:—

A platform of a certain height was erected over the hatchway, a shoot or slide was placed with the upper end resting on this platform, and the lower end extended over the side of the vessel down to a convenient height to allow coals passing through it to fall into carts placed so as to receive their loads from the shoot. The lower end so inclined over the ship's side to the wharf was supported by ropes or chains fastened to the end of a gaff running out from the main mast. This gaff was supported by a chain running from it to an iron hook attached to the main mast.

The coals were raised in a large tub, by tackle running through a pulley attached to the end of a boom extended from the mast and worked by a steam winch. This tackle was entirely unconnected with the chain, hook and gaff which supported the shoot.

Two men were placed on the platform to receive and empty the tub down the shoot when filled and raised by the winch of sufficient height to be capsized into the shoot. These men commanded and controlled the action of the winchman as to the height to which the tub should be raised, the lowering of it to accommodate it to the shoot, and to loosen the tension at the time convenient to have the contents of the tub emptied into the shoot.

The winchman was an employee of the ship, but the stagemen of whom the plaintiff (respondent) was one, were employed by the stevedores.

The accident in question occurred by the tub, containing from 800 to 1000 lbs. of coal, being allowed to be raised from 2½ to 3 feet over the shoot before the order was given by the stagemen to the winchman, to lower or let go the tackle, in place of a few inches which was sufficient, the consequence being that the tub with its weighty contents descended with great velocity and force upon the upper end of the shoot. Something had to yield; the iron hook gave way; the gaff and tackle fell upon the respondent on the platform and caused the injury which he sustained.

The respondent contends that the accident was occasioned by the insufficiency and bad material of the hook that broke; the appellant, that it was from the carelessness of the stagemen of whom the respondent was one.

The respondent's witnesses, not specially qualified as judges of iron, swear that the hook was insufficient, that the iron where it broke was not all of one quality or color, but it is proved that the same hook had been for years used for the same purpose of sustaining the shoot, to unload the vessel, and also to sustain the sails, which was more arduous, and that it never would have broken by the ordinary usage when so unloading, nor if the weight of the tub with from 800 to 1000 lbs. of coals had not descended on it in the manner it did, which it is in fact reasonable to suppose from the previous experience of the vessel. The descent of this heavy weight operated like a trip hammer. It would have required extraordinary

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tackle to resist the impulse or momentum of such a weight, and readily accounts for the hook giving way. It is said, however, that the other stageman was the person who gave the order, but the respondent was undoubtedly present on the platform as a stageman and was responsible for the sufficiency of the orders.

In the evidence of Hyacinthe Barron, a witness produced by the respondent, p. 21, l. 28 of his appendix, Barron says, speaking of the respondent: "Il gagnait à peu près vingt-deux ou vingt-trois cents l'heure; il était *premier Stageman*;" and at p. 16, l. 37: "Le tonneau a tombé au bout de la chute et s'est renversé dans la chute." P. 17, l. 1, "Le tonneau a frappé au bout de la chute."

I think it is made quite evident that the accident would not have happened had the respondent as stageman given the proper orders to lower the tub at suitable time, and not let it fall with such impetus on the shoot.

There has been a series of decisions as regards contributory negligence. I understand there is no difficulty about the legal principle, and there is no substantial difference between the English and the French law in this respect. Although a defendant may be guilty of negligence it does not exonerate a plaintiff from the exercise of diligence on his part. If he is himself guilty of negligence without which the accident would not have happened, then he has no right to recover from a defendant although the latter may have also been guilty of negligence.

BABY, J.:—

Il s'agit ici d'une de ces actions de dommages comme il en vient beaucoup trop souvent devant ce Tribunal.

Les faits sont biens simples. Le 26 juin 1882, Langlois était employé au déchargement du steamer "Polino" alors dans le port de Montréal et la propriété de l'appelant. Ce navire était chargé de charbon. Pendant que Langlois travaillait ainsi pour le compte de l'appelant, l'appareil employé pour le déchargement cassa subitement et, en tombant, alla frapper Langlois qui fut renversé sans connaissance sur le pont du vaisseau et blessé grièvement.

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Langlois a poursuivi en recouvrement de dommages-intérêts au montant de $200 et le jugement de la Cour Supérieure les lui a accordés.

Les défendeurs ont rencontré cette action en alléguant que Langlois a été victime de sa propre faute ; que l'accident n'est dû qu'à la négligence du demandeur-intimé dans l'exercise de son devoir ; de plus, qu'en s'engageant pour l'ouvrage qu'il faisait au temps de l'accident, il a pris sur lui les risques inhérents à cet emploi ; et que, sur le tout, ils ne sont pas responsables.

C'est une question de responsabilité qui se présente ici. Langlois est-il censé avoir pris sur lui ou accepté les risques en question, ou bien cette responsabilité repose-t-elle entièrement sur l'appelant ?

L'accident a été causé par le fait qu'un crochet en fer qui servait à soutenir la glissoire, sur laquelle se déchargeait le charbon, étant vieux, rouillé et de mauvaise qualité, s'est cassé entièrement. A qui incombait le devoir de s'assurer que les appareils employés pour le déchargement du navire étaient de force suffisante pour résister au poids et à la tension du charbon qui était ainsi déchargé ? Au propriétaire, assurément.

Mais, dit-on, c'est lui, Langlois, qui a augmenté la tension sur le crochet en question, en laissant tomber le charbon sur la glissoire de 2 ou 3 pieds plus haut que d'habitude. C'est vrai, jusqu'à un certain point, mais si ce crochet avait été de bon fer et de force ordinaire, il aurait pu indubitablement résister à ce faible surcroît de tension. D'ailleurs, on devait prévoir une telle occurrence et fournir à ses employés un appareil qui offrait les conditions voulues de sureté. C'est là un des premiers devoirs du maître vis-à-vis de ses serviteurs.

En s'engageant, Langlois connaissait les risques résultant du travail auquel il se soumettait, mais non pas de ceux provenant de l'insuffisance de l'appareil qu'on lui fournissait pour s'acquitter de son ouvrage. L'excuse que ce crochet avait déjà servi plusieurs fois pour les mêmes fins ne peut guère exonérer l'appelant, au contraire c'était là une raison de plus pour obliger l'appelant, s'il ne vou-

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lait pas être taxé de négligence, d'examiner soigneusement ce crochet avant de permettre à ses employés de s'en servir et de s'assurer qu'il était en bon état. En ne faisant pas cet examen, il a laissé ses employés se servir d'un objet vieux, rouillé et en mauvais état et par conséquent, pas du tout propre à l'usage auquel on l'employait, et qui, en se cassant, a déterminé l'accident dont Langlois a été la malheureuse victime.

Quoiqu'on en ait dit, l'appelant n'a pas agi comme on l'a fait dans la cause Gauthier, en mettant le demandeur sur ses gardes ou lui faisant défense de se servir de ce crochet. Non, bien au contraire, il est celui qui a fourni à Langlois l'objet cause de l'accident. Les deux causes ne sont donc pas semblables, tel qu'on l'a affirmé.

Sous ces circonstances, est-il possible de dire que Langlois est responsable de ce qui lui est arrivé ? Non. Nous ne voyons donc pas que la responsabilité puisse reposer sur d'autres épaules que sur celles de l'appelant, et cette manière de voir étant celle qui a fait rendre le jugement en première instance, nous n'avons qu'à le confirmer avec dépens.

RAMSAY, J. :—

This is an action of damages for injury done to a labourer on board the ship "Polino," who was assisting to unload her cargo of coal. The duty of plaintiff was to stand on a platform raised above the deck, and when the bucket of coal came to a proper level, to push it out over the slide, where it was tilted at the word "let go," and the coal was thus rolled down to the carts below. While performing this duty, a hook broke, the tackle fell and struck the plaintiff, throwing him down, and doing him considerable injury. By his action, he asked for and recovered $200. The defendant appeals and says there was no evidence of negligence on his part, that the tackle was all in good order, that the plaintiff, on the contrary, was negligent in having let the bucket be upset when it was several feet above the slide. That by doing this, a greater strain was thrown on this hook, and in consequence of this it broke.

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There is no special evidence to show the condition of this hook immediately before the accident, and the fact is it broke while being used about the work for which it was provided. Again, I quite agree with the learned judge in the court below that to be sufficient for its purpose, the hook ought to have been amply sufficient to stand any strain that was likely to be put upon it by ordinary unskilled labourers. In other words, the owner cannot clear himself of responsibility, by saying that if the labourer at a gross work of that kind had used the most perfect care, the accident might not have happened. The labourer, as the owner, is not bound to use the greatest skill and care, but only ordinary skill and care. I think there is nothing to show that the plaintiff acted so as to make himself responsible for the accident, and the responsibility naturally falls on the owner. The latter is as liable for the injury done to the plaintiff as he is for the breakage of the hook. The question of responsibility of the employer presents no special difficulty under our law, for, luckily for us, the bad precedent under English jurisprudence (1) which seems to have been at the root of all the difficulties in England, has not force of law here. We have therefore only to consider the application of ordinary propositions of law under the evidence. It would be tedious and perhaps difficult to provide specially for the cases, at least it was found to be so, when in 1880 it was deemed expedient to draw "The Employers' Liability Act;" but each case as it occurs presents little difficulty. There was the case of *Periam & Dompierre*, (2) which illustrates the principle of fault on the part of the sufferer from his stationing himself in a place he knew to be a place of danger. We have had also the case of *Desroches et al. & Gauthier*, (3) where the evidence showed that the sufferer had acted with wilful negligence. And the last case (4) was where a man was drowned

(1) *Priestly* v. *Fowler*, 3 M. & W., p. 1.
(2) 1 Legal News, 5.
(3) 5 Legal News, 404.
(4) *La Compagnie du Richelieu et Ontario & St. Jean*, M. L. R., 1 Q. B. 252.

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owing to the ordinary risks of a seaman's life. The principle on which the last case was decided in appeal was scarcely questioned; but it was contended that the master of the vessel from which the deceased fell into the water had not used every possible effort to save him. We thought that the *onus probandi* of negligence on this issue was on the plaintiff, and that the evidence was insufficient. I am to confirm.

Judgment confirmed.

Abbott, Tait & Abbotts, Attorneys for Appellant.

O. Gaudet, Attorney for Respondent.

(J. K.)

March 21, 1885.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

THE ST. LAWRENCE SUGAR REFINING COMPANY, (*Defendant below*), APPELLANT;

AND

CAMPBELL, (*Plaintiff below*), RESPONDENT.

Master and servant—Responsibility of employer—Negligence of servant—Injury to fellow-servant—C.C. 1053, 1054.

An employer is liable for any want of care on his part by which his servant is injured; and, therefore, if he engages an unskilled or careless person to conduct his work, and owing to the want of skill or care of the person so employed, another workman is injured, the employer is responsible. But in order to hold the employer responsible, it must be clearly established that the negligence or want of skill of the fellow workman caused the accident by which the damage was occasioned. So, where two workmen were engaged in an operation not shown to be hazardous, and an explosion occurred which killed the superior workman and injured the plaintiff who was assisting the other, it was *held* that the workman injured had no right of compensation from the employer, in the absence of any evidence as to the cause of the accident, or that the employer was in fault by having hired a careless or unskilful workman.

The appeal was from a judgment of the Superior Court, Montreal, (MATHIEU, J.), maintaining the action of the respondent.

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The case arose out of an accident which occurred in the sugar refinery of appellant in 1881. Campbell, the respondent, a laboring man, was employed in the refinery, and on the 23rd of June was instructed by Blondin, the chief engineer, to assist one Parizeau, a machinist, in bending copper pipes. In this process the pipes are filled with melted rosin before being bent, and afterwards the rosin, which has cooled and solidified, is removed by holding the pipe over the fire and allowing it to melt out. On the day in question, while melting the rosin out of a bent pipe, an explosion took place, which caused the death of Parizeau, and Campbell was seriously injured. He sued for damages, and the court below allowed him $100. The principal reasons assigned in the judgment were as follows:—

" Attendu que l'accident paraît avoir été causé, soit parce qu'un bouchon ou cheville qui fermait l'un des bouts du tuyau n'aurait pas été enlevé lorsqu'on a fait chauffer le tuyau pour en faire sortir la résine qui s'y trouvait, ou parce que le dit tuyau n'aurait pas été chauffé d'abord à son extrémité et que la chaleur plus intense à l'intérieur aurait occasionné l'explosion ;

" Attendu qu'il résulte de la preuve que cet ouvrage n'était pas un ouvrage dangereux par lui-même, mais ne l'était que si ceux qui le faisaient ne prenaient pas les précautions qu'ils devaient prendre ;

" Attendu que cet ouvrage était confié spécialement au mécanicien Parizeau ; que ce dernier était un mécanicien habile et parfaitement en état de faire cet ouvrage et que, si cet accident a eu lieu, il appert que c'est uniquement par la négligence du dit Parizeau qui n'aurait pas pris les précautions voulues pour prévenir cet accident ;

" Considérant que la dite défenderesse est responsable des dommages causés par la faute de son employé, même vis-à-vis de son co-employé, surtout dans la position où se trouvaient Parizeau et le demandeur, le dit Parizeau étant un mécanicien habile et seul chargé de la conduite de cet ouvrage, et le demandeur n'étant chargé que de l'aider comme simple journalier ;

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" Attendu que la dite défenderesse prétend dans son premier plaidoyer que le dit accident a été causé par la faute et la négligence grossière du dit demandeur et de son co-employé, et que le demandeur ne s'est pas conformé aux instructions qui lui étaient données ;

" Considérant que ce moyen invoqué par la dite défenderesse est mal fondé en fait et en droit ; en fait, le demandeur n'était pas chargé de la conduite de l'ouvrage, c'était Parizeau qui en avait la conduite et la surveillance, étant un mécanicien habile et le demandeur étant un simple journalier, et il n'est pas prouvé qu'il y ait eu faute de la part du dit demandeur ; en droit, la défenderesse est responsable du dommage causé à un de ses employés par la négligence de son co-employé ; " etc.

Saint-Pierre, Q.C., for the appellant :—

The appellant submits the following propositions : (1). Assuming that Campbell had been engaged as a mere labourer originally, it is in evidence that helping the machinist at bending pipes was one of his occupations. (2). It is established in evidence and acknowledged by the judgment that bending of pipes in the manner described above is an operation offering no difficulty and no danger whatever. (3). It is admitted by all that Parizeau was a very skilful machinist and a cautious and prudent man. (4). It is proved that Campbell, when ordered to go and help Parizeau, offered no objection but, on the contrary, went willingly. (5). There is no evidence that the order thus given to Campbell to go and help Parizeau was given by a person having the proper authority to give such an order, and there is no evidence that such an order was given to the knowledge of the company appellant or of its proper representative. (6). There is no proof of the actual cause of the accident. It might have been caused as supposed by Baumgarten and Blondin, and it might have been caused by the presence of explosive matters in the rosin, such as gaseous substances or even air or water. Therefore there is no proof of any neglect on the part of Parizeau.

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R. D. McGibbon, for respondent:—

Parizeau was a skilled machinist: the respondent was a common labourer, ordered specially on this occasion to assist Parizeau. The latter was in charge of the operation, and it was through his negligence that the accident occurred. Under C. C. 1054, the employer is responsible for the fault and negligence of his servant.

BABY, J.:—

Il s'agit ici de dommages-intérêts réclamés et obtenus en Cour Supérieure par le nommé Campbell. Celui-ci, le 23 juin 1881, était dans l'emploi de l'appelante comme journalier, son occupation ordinaire étant d'assister les mécaniciens dans leur ouvrage. Le jour en question, il aidait, comme d'ailleurs il l'avait fait souvent auparavant, le nommé Parizeau, un homme reconnu comme fort habile mécanicien, à courber des tubes ou cylindres en cuivre dont on se sert dans cette rafinerie de sucre.

Le procédé auquel on a recours pour arriver à courber ces cylindres est fort simple: on ferme avec un bouchon en bois un des bouts du cylindre, lequel est alors rempli de résine en ébullition, et cette substance, en se refroidissant, forme un tout avec le métal. Alors le tube est courbé de la manière voulue. Ceci fait, on débouche le cylindre et cette partie étant placée au-dessus du feu, la résine fond et s'écoule graduellement.

Dans le cas actuel, le tube n'avait point été courbé et son extrémité était tout bonnement tenue au-dessus d'un feu allumé dans la cour de la fabrique pour en faire sortir la résine—opération, comme on le voit, d'une grande simplicité. Tout-à-coup, ce tube fait explosion, Parizeau est tué sur le coup et Campbell est atteint par la résine liquide qui lui brûle la figure et les mains. On transporte ce dernier à l'hôpital où il demeure quelque temps et, le 15 août suivant, se sentant suffisamment guéri, il vient reprendre son emploi au service de l'appelante, y demeure jusqu'au 19 mai 1882, c'est-à-dire, plus de neuf mois, et puis quitte le service et porte son action—la compagnie lui ayant payé son salaire comme d'ordinaire tout le temps de son absence de la fabrique.

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La question qui se présente ici est de savoir si la compagnie qui a été condamnée à payer à Campbell des dommages-intérêts peut être tenue responsable de ce qui est arrivé à son serviteur. Pour cela, il faut constituer l'appelante en faute évidemment.

Les théories mises de l'avant par les parties comme causes de l'explosion sont diverses, mais rien ne démontre que la compagnie n'ait pas fait ce qu'elle était tenue de faire et se soit rendue coupable de négligence dans l'espèce, soit en ne prenant point les précautions requises pour parer, humainement parlant, à cette explosion, soit en faisant ou laissant faire l'opération dont il s'agit dans des conditions propres à mettre en danger ceux qui en étaient chargés par elle. Comme nous l'avons dit, cette opération était de la plus grande simplicité et n'offrait en soi aucun danger. Un tube de cuivre rempli d'une substance tout-à-fait anodine est placé au-dessus du feu qui fait fondre cette substance peu à peu, et Campbell voit à ce que le tube soit chauffé de manière à obtenir le résultat demandé. Sous de telles circonstances, est-il possible de faire peser la responsabilité de l'accident sur la compagnie, plus qu'on le ferait, si Campbell, malencontreusement s'était versé le contenu brûlant du tube sur les pieds ou sur les mains ? Non, évidemment. D'ailleurs, en un mot, il n'y a aucune preuve quelconque au dossier de négligence de la part de la compagnie ou de Parizeau, celui préposé à la surveillance de l'opération en question, telle qu'on la trouvait établie in *Ross & Langlois*, (1) une cause jugée par cette Cour, il y a peu de temps, et on ne saurait la présumer. Cette cour ne croit donc point qu'il est possible ici de condamner la compagnie à payer au demandeur-intimé Langlois, des dommages-intérêts. Le jugement est donc infirmé avec dépens.

RAMSAY, J. :—

I concur in the judgment that has just been rendered. Cases of difficulty will always arise on the question of responsibility where there are accidents of this kind. Our law fortunately is unembarrassed by any artificial juris-

(1) *Ante*, p. 280.

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prudence disturbing general principles. An employer is liable for any want of care on his part by which his servant is injured; and so, if he engages an unskilled person to conduct his work, and owing to the want of skill of the person so employed, another workman is injured, the employer is responsible, precisely for the same reason he is responsible for defective machinery, or any other cause of disaster. So far as I know, the jurisprudence here has not varied on this point. It does not follow that all our judgments are good, but the governing principle has never been lost sight of. In the particular case before us, two men were sent to perform a simple operation which both understood perfectly. They proceeded negligently and an explosion took place, by which one was killed and the other (the respondent) was injured. There is no evidence to show whether both were in fault, or whether the one to blame was the deceased or the respondent; therefore there is nothing to fix responsibility on the employer.

DORION, C.J.:—

This case, in my opinion, admits of no difficulty. There is no responsibility unless there is fault, and fault must be proved. Here two men were engaged in some work for the company. There is no proof that there was any great danger in what they were doing. But an explosion occurred, by which the plaintiff was injured and the other workman killed. There is not a single witness who states how the accident occurred, nor is there anything to show that the company was in fault or that the other workman was in fault. It cannot be presumed that the accident occurred through their fault. The respondent's action, therefore, must fail in the absence of any evidence adduced by him to support it.

The following is the judgment:—

" La Cour, etc.

" Considérant qu'il n'est pas prouvé que les dommages soufferts par l'intimé, et dont il se plaint dans sa déclaration, soient arrivés par le fait ou la faute de la compagnie appelante;

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" Et considérant qu'il y a erreur dans le jugement rendu par la Cour de première instance ; savoir : le jugement de la Cour Supérieure siégeant à Montréal le 31 juin 1883 ;

" Cette Cour casse et annule le dit jugement," etc.

Judgment reversed.

Saint-Pierre & Bussières, attorneys for appellant.

Girouard & McGibbon, attorneys for respondent.

(J. K.)

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9 décembre 1884.

Coram SIR A. A. DORION, J. C., MONK, RAMSAY, TESSIER et BABY, JJ.

LA COMPAGNIE DU CHEMIN DE PÉAGE DE LA POINTE-CLAIRE,

(*Défenderesse en Cour inférieure*),

APPELANTE ;

ET

LOUIS LECLERC,

(*Demandeur en Cour inférieure*),

INTIMÉ.

Municipalités de villages—Municipalités locales—Code Municipal, art. 19, § 3, *et art.* 27—*Péage—Empierrement des chemins*—33 *Vict., c.* 32—36 *Vict., c.* 26, *s.* 4.

JUGE :—1o. Qu'aux termes du Code Municipal (34 Vict., c. 68, art. 19, § 3) les "municipalités locales" comprennent les municipalités de villages.

2o. Que l'article 27 du même code ne fait qu'indiquer quelles municipalités rurales seront considérées comme municipalités locales, sans égard aux municipalités de villages, qui tombent sous la règle générale établie par l'art. 19, § 3.

3o. Que par conséquent une compagnie dûment incorporée en vertu de l'acte 33 Vict., c. 32, avait le droit d'empierrer un chemin de front dans les limites d'une municipalité de village, d'y poser des barrières et d'y percevoir des péages.

4o. Qu'en vertu du dit acte, une telle compagnie a le droit d'exiger un péage pour une fraction de mille parcourue, pourvu que sur toute la longueur du chemin parcouru le taux n'excède pas le montant par mille fixé par la cédule B du dit statut.

L'intimé, demandeur en Cour inférieure, a poursuivi la compagnie appelante pour le recouvrement d'une somme de 88 centins, que la compagnie aurait exigé illégalement à titre de péage dans les limites de la municipalité du village de la Pointe-Claire. L'action, d'abord intentée en Cour de Circuit, a été évoquée à la Cour Supérieure à la demande de l'appelante.

Le 14 novembre 1883, la Cour Supérieure, présidée par l'hon. juge Mathieu a rendu jugement maintenant l'action du demandeur.

Les faits de la cause et les prétentions des parties sont suffisamment exposés dans l'opinion suivante, et dans le jugement formel de la Cour d'appel.

RAMSAY, J.:—

This appeal gives rise to two questions: First, whether the appellant has a right to interfere with the road passing through the incorporated village of Pointe-Claire at all. Second, whether it has exercised its right properly or not. The argument on the first point is to this effect—that the village of Pointe-Claire, being a village municipality, no such right could be intended to apply to it because it has the control of its own roads, and is not a local municipality; and that the act of 1870 (33 Vic., c. 32), on which appellant's title is founded, does not authorize the construction of macadamised roads by independent companies in town or village municipalities. The first statute in order of date, as well as in logical sequence, is cap. 85 C. Sts. C., the purport of which is to vest the right to use all roads, streets and public highways in any city or incorporated town in the then province of Canada in the municipal corporation of such city or incorporated town.

The corporation was further made liable to maintain such roads, streets and highways, and it might be criminally proceeded against for its neglect so to do. It is per-

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fectly evident that this act can have no influence on the decision of this case, for Point Claire is not a city or incorporated town, but an incorporated village, and does not by necessary intendment fall within the rule applicable to cities and towns, unless it can be shown that incorporated villages are assimilated in all respects to cities and incorporated towns by other laws. This is affirmed by respondent in his factum, but the laws assimilating are not specified, and I have not been able to find any law of the kind.

The next point made by respondent is, that the Municipal Code distinguishes between local municipalities and those consisting of cities, incorporated towns and villages, that the general act for incorporating companies to construct macadamised roads is only applicable to local municipalities. I think respondent is in error in saying that the M. C. art. 27, makes this distinction. The object of arts. 26 and 27 is not to distinguish what is or is not a local municipality, but to deal with the different conditions of the territory to which the Municipal Code was to apply. The first article of the M. C. declares that "the Municipal Code applies to all the territory of the province of Quebec, excepting the cities and towns incorporated by special statutes." Again, art. 19 § 1, explains the meaning of the word "municipality;" § 2 explains the meaning of the terms "rural municipality," or "country municipality," and § 3 tells us that the adjective "local" when it qualifies the words "municipality," "corporation," "council," or "councillor," refers *indifferently* to country, village or town councils, councillors, corporations or municipalities. The meaning of this sentence is made more clear by the French text which for "refers indifferently" has "*désigne indistinctement un conseil, un conseiller, une corporation ou une municipalité de campagne, de village et de ville.*" If the distinction insisted upon by respondent could be admitted, the inference might be fair enough that the 33 Vic., c. 32, did not apply to incorporated villages, but it seems to me there is no room for such a distinction under these very precise definitions.

The case of Iberville and Jones has been relied upon, in support of the contention that the powers of the corporation of Point Claire were not over-ridden by the act incorporating the appellant; but that case lays down a principle which in no wise affects the present case. What we said there was, that a special right of property, conferred by an act, was not presumed to be revoked by a general act of incorporation, which in express terms did not refer to it and which was not incompatible with it.

The second proposition is that the appellant could only charge by the mile. I believe it was even urged that if the traveller only went half a mile on the road, he went free. This interpretation is impossible from the nature of the thing even if the terms were more favorable. All that is said about it is, that the company may fix any rate which shall not exceed the schedule B, which allows so much a mile. That is, a traveller shall not pay more than 2 cts per mile for the use of the whole road. Besides such an interpretation would make section 26 an absurdity. There would be no use of turnpike gates if they were not to be used for collecting tolls; and the company would be obliged to question each traveller as to how far he was going and to believe him, or to send a special messenger with each, and charge the traveller as he left the road.

I am to reverse.

Le jugement formel est rédigé dans les termes suivants:

"Considérant que par lettres patentes octroyées le 30 mars 1880 en vertu des dispositions de l'acte 33 Vict., ch. 32, tel que modifié par l'acte 36 Vic., ch. 26, la compagnie appelante a empierré sur une largeur de 14 pieds le chemin qui longe le fleuve St-Laurent dans les municipalités de la paroisse et du village de la Pointe-Claire, dans le comté de Jacques-Cartier, depuis le chemin de la Côte des Sources à l'extrémité Est de la paroisse jusqu'au chemin de la Côte St-Charles;

"Et considérant qu'en vertu de ces lettres patentes la dite appelante a empierré le dit chemin longeant le dit fleuve St-Laurent dans toute l'étendue des limites indi-

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quées en icelles, comprenant cette partie de la paroisse de la Pointe-Claire érigée en village par ordre en conseil du 28 septembre 1854;

"Et considérant que la compagnie appelante a fait placer sur son chemin dans la partie Est de la municipalité du village de la Pointe-Claire deux barrières où elle ne prélève qu'un seul péage, les deux barrières ayant été érigées au lieu d'une, afin d'empêcher les personnes se servant du chemin d'éluder le paiement des droits imposés en faveur de la compagnie;

"Et considérant qu'il est prouvé que l'intimé a payé à la compagnie appelante pour avoir, le 1er août 1882, passé 11 fois dans la dite barrière les 88 cts qu'il réclame par son action;

"Et considérant que l'intimé réclame le remboursement de cette somme de 88 cts qu'il prétend avoir été perçue sans droit en autant: 1o. que la compagnie appelante ne pouvait être autorisée à empierrer le chemin de front dans les limites de la municipalité du village de la Pointe-Claire érigée en municipalité de village longtemps avant l'octroi des lettres patentes de la compagnie, et y ériger des barrières; et que cette municipalité de village n'est pas une municipalité locale aux termes de l'acte 33 Vict., ch. 32;

2o. Que le chemin en question dans la municipalité du village ayant déjà été empierré, la compagnie appelante ne pouvait prélever des péages des propriétaires tenus à l'entretien de ce chemin sans auparavant rembourser à ceux qui l'avaient fait la valeur de leurs travaux conformément aux dispositions de l'acte 36 Vict., ch. 26, sec. 4;

"Et considérant que par l'acte 33 Vict., ch. 32, le lieutenant-gouverneur en conseil est autorisé à octroyer, après l'observation des formalités requises, aux propriétaires des deux-tiers en valeur des terrains obligés à l'entretien de tout chemin de front, des lettres patentes autorisant tels propriétaires à empierrer tel chemin de front, passant dans une ou plusieurs municipalités locales;

"Et considérant qu'aux termes du Code Municipal (34 Vict., ch. 68, art. 19, § 8) les municipalités locales com-

prennent les municipalités de villages, et que l'article 27 du même code cité par l'intimé n'est que pour indiquer quelles municipalités rurales seront considérées comme municipalités locales, sans égard aux municipalités de village, qui tombent sous la règle générale établie par l'art. 19, § 3 ;

"Et considérant qu'en vertu de ses lettres patentes la compagnie appelante avait le droit d'empierrer le chemin de front comme elle l'a fait dans la dite municipalité du village de la Pointe-Claire, d'y poser des barrières et d'y percevoir des péages comme elle l'a fait ;

"Et considérant sur le second point qu'il n'est pas prouvé que le dit chemin de front dans le dit village de la Pointe-Claire ait jamais été empierré, et qu'à tout événement l'intimé, n'étant pas, et n'ayant pas été lors de la prise de possession du dit chemin par la compagnie appelante, propriétaire d'aucune propriété riveraine, ne pouvait exiger l'exemption établie par la section 4 de l'acte 36 Vict., ch. 26, en faveur de ceux qui auraient déjà empierré le dit chemin ;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour de première instance le quatorze de novembre 1883 ;

"Cette Cour casse et annule, etc."

Jugement infirmé.

St-Pierre & Bussières, pour l'appelante.

Laflamme, Huntington, Laflamme & Richard, pour l'intimé.

(E. L.)

April 2, 1885.

Coram DORION, C.J., MONK, RAMSAY, BABY, JJ.

THE QUEEN,
(*Claimant in Court below*),
APPELLANT;

AND

THE EXCHANGE BANK OF CANADA,

AND

MASSUE AND CAMPBELL ET AL.,
(*Contestants below*),

AND

THE MERCHANTS BANK OF CANADA,
(*Intervenant below*),
RESPONDENTS.

Privilege of the Crown—Deposit in Bank—C. C. P. 611.

HELD:—1. (Following *Monk & Atty. General*, 19 L. C. J. 71), that the privilege of the Crown for its claims over those of private competing creditors is to be governed by the Civil Law of the Province of Quebec, derived from France, and not by the law of England.

2. That under C. C. P. 611, in the absence of any special privilege, the Crown has a preference over chirographic creditors for deposits due to it by a bank in liquidation.

3. The holders of notes of the insolvent bank, being accorded by Statute a special privilege, (43 V., c. 22, s. 12,) take precedence of the Crown.

The appeal was from a judgment of the Superior Court, Montreal (MATHIEU, J.) Dec. 1, 1884, rejecting the claim of the Dominion Government to be paid by privilege the sum of $237,840.24, amount of deposit in the Exchange Bank of Canada, in liquidation. There was a similar appeal from a judgment rejecting a like claim of the Provincial Government of Quebec.

DORION, C. J. (*diss.*):—

In September, 1883, the Exchange Bank of Canada was

put in liquidation, under the provisions of the Act 45 Vict., ch. 23 (Canada), and Alexander Campbell, F. B. Mathews and Thomas Darling were appointed liquidators.

On the 15th March, 1884, the Attorney-General for the Province of Quebec, filed with the liquidators in the name of Her Majesty a claim against the estate of the Bank for the sum of $75,000, being the amount of a deposit made with the Bank on the 8th of September, 1883, payable with interest at the rate of five per centum, per annum, and demanded that the amount due in principal and interest be paid by privilege out of the assets of the Bank.

L. H. Massue, one of the respondents, and a creditor for a sum of $20,000 deposited with the Bank, on the 7th of February, 1883, and the Merchants' Bank, another creditor for a sum of $3,050, as holders of unredeemed bills issued by the Exchange Bank, have contested the privilege claimed by Her Majesty to be paid her claim by preference to other creditors out of the assets to be distributed by the liquidators.

On the 10th March, 1884, the Attorney General for the Dominion of Canada filed another claim on behalf of Her Majesty for a sum of $237,840.27, of which $200,000 were for two loans of $100,000 each, made by the Government of Canada to the Exchange Bank, at the rate of five per centum per annum, and $37,840.27 were for an ordinary deposit, and he also demanded that this last claim, in principal and interest, be paid by privilege and preference over the other creditors out of the assets of the Bank.

Massue, the Merchants Bank, and Wilmer C. Wells, another creditor of the Exchange Bank, have contested the privilege claimed on behalf of Her Majesty for the payment of this last claim.

The liquidators have been made parties to these proceedings, but they have taken no part in the contestations, simply declaring that they would abide by the judgments to be rendered, *qu'ils s'en rapportaient à justice.*

There are no difficulties about the facts. The several claims made by the parties are admitted as well as their

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origin. The only disputed points are 1st. whether the claims of the Crown on behalf of the Dominion of Canada, and of the Province of Quebec, and which will absorb a large proportion of the assets of the insolvent Exchange Bank, are to be paid first and in preference to all the ordinary creditors of the Bank; and 2nd. whether they are to be paid in preference to the Merchants Bank's claim for unredeemed Bank Bills, which, by the Banking Act (43 Vict., ch. 22, sec. 12, Canada), is declared, in case of insolvency, to be a first charge on the assets of the Bank.

The Court below held that the Government of the Province of Quebec and the Dominion Government were mere ordinary creditors, having no privilege to be paid by preference to the other ordinary creditors of the estate.

From this judgment two appeals have been instituted, one on behalf of the Province of Quebec, and the other on behalf of the Dominion of Canada, but both in the name of Her Majesty.

The appellants claim to have a privilege:

1st. By virtue of the rights and prerogatives of the Crown as they existed at the time this country was ceded to Great Britain, and which have then become part of the public law of the land.

2nd. By virtue of the civil law in force in this country.

3rd. Under the provisions contained in Art. 611 of the Code of Civil Procedure.

The first point on which the appellants rely has already been decided in the cases of the *Attorney General & Black*, Stuart's Reports, 324; *Monk & Ouimet*, 19 L.C.J. 71; and *Ouimet & Marchand*, 5 Revue Légale, 361.

In these several cases, it has been uniformly held that the claims and privileges of the Crown against its debtors did not form part of the higher or essential prerogatives of the Crown, which had become part of the public law of the land, when the country was ceded to Great Britain, and that they are governed by the laws in force in the Province relating to civil matters. In addition to the uniform jurisprudence of our Courts on this point, we may

add that the rule has been repeatedly recognized and acted upon by the legislation of this Province.

By the articles 6, 1989, 1994, 2032, and 2086 of the Civil Code, and by several statutes referred to in article 607 of the Code of Civil Procedure, the privileges and hypothecs of the Crown on the moveable and immoveable property of its debtors have been determined and regulated, and these several provisions of our law which were in force when the British North America Act, 1867, was passed, were continued in force by the 129th section of that Act. The prerogatives of the Crown have, therefore, nothing to do with this question.

Privileges on moveable property are general when they attach to the whole of the moveable property of the debtor, and special when they only affect some particular objects (Art. 1993, and last paragraph of Art. 1994, C. C).

There are only two articles in the Civil Code which have a special reference to the privileges of the Crown. The first is article 1989, which refers, in general terms, to the special privileges secured to the Crown by the laws relating to Customs duties and other dispositions contained in special statutes concerning matters of public administration.

The other is Article 1994, which after providing that the several privileges therein enumerated shall take precedence in the order they are given, mentions ten classes of privileges on moveable property, the tenth and last being "*for the claims of the Crown against persons accountable for its moneys.*"

In the French version the words are: "*La Couronne pour créances contre ses comptables.*"

The word "comptable" as applied to the debtors of the Crown has in the French law a technical meaning. It is used to describe particular officers who had the collection and management of the Crown revenues and were accountable for the same. (Nouveau Dénisart, vo. Comptable). In France the king had a privilege on all the property of his *comptables* for any balance of the monies for

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which they were accountable as such (Edit. of 1669), but this privilege did not apply to other claims of the Crown. This is clearly established in the following passages of the Nouveau Dénisart, Vo. Comptable, § 3, No. 11, wherein the authors of that valuable collection, say:

No. 11.—" Il ne faut pas confondre les créances que le " Roi exerce contre un comptable en qualité de comptable " avec les créances personnelles qu'il peut avoir contre le " même particulier. Par arrêt du 14 mai, 1748, le Conseil " a jugé entre le controleur des bons d'état et les fermiers " généraux, que ceux-ci doivent être payés des sommes " dûes par le Sieur Bouvelais, receveur du tabac à Paris, " pour reliquat de compte de sa recette, sur le prix prove- " nant de la vente de ses effets, par privilége et préférence " au Roi, créancier du même Bouvelais à cause d'un prêt " fait à ce particulier pour favoriser l'entreprise de la " verrerie de Sévre."

The *Contrôleur des bons d'état* represented the claim of the king, while the Fermiers Généraux exercised their claim as *cessionnaires* of the duties on tobacco, which duties constituted a privileged claim. This same arrêt is also cited in the work known as Old Dénisart, Vo. Comptable, with somewhat greater developments.

It is evident, that it is in the sense attributed to it in the French law, that the word *comptable* has been used in Art. 1994 of the Civil Code, which is not given as new law, but as being in accordance with the rules and principles which prevailed before the Code as to the causes of preference which gave rise to privileges among creditors. By this last article the privilege of the Crown, when not coming within the class of special privileges mentioned in Article 1989, was restricted as it was before the Code to claims arising out of the collection or management of the revenues of the Crown by " *Comptables*," that is by such persons as were accountable for the same, and it did not apply to claims for loan of money, or for deposits, or claims founded upon ordinary contracts. This privilege, which is a general privilege affecting all the moveables of the *comptables*, was placed the last in the order of preference,

among the other general privileges, and this is the rank which it always held in the French Legislation. (Pothier —Proc. Civile. Ed. Bugnet, p. 226, 2d. al. Troplong, Priv. & Hyp. No. 39).

There being no other article in the Code, nor any other provision of law allowing to the Crown a general privilege, except this article 1994 of the Civil Code, the second pretension of the appellant, that under the civil law, as existing in this country, the Crown is entitled to be paid by privilege the amount of its claims out of the assets of the Exchange Bank, is without any foundation.

The third and last proposition urged on behalf of Her Majesty is, that under art. 611 of the Code of Civil Procedure all the claims of the Crown, whatever may be their nature or origin, are privileged and should be paid in preference to all other creditors.

This article provides that: "In the absence of any spe- "cial privilege, the Crown has a preference over chirogra- "phic creditors for sums due to it by the defendant."

It is unfortunate that terms so vague and so general have been used in connection with this difficult subject. The simple reading of the article suggests important difficulties and shows that it is most ambiguous.

Is it, in the absence of any special privilege whatsoever, or only in the absence of any special privilege of the Crown, that the Crown has a preference over chirographic creditors? Does that preference extend over all chirographic creditors, whether they have a privilege or not? And lastly, does the preference exist only for sums due by a defendant, and is there no preference where, as in this case, there is no defendant?

If it is said that this preference takes place only when there are no special privileges whatsoever coming in contact with the claims of the Crown, then the preference or privilege of the Crown does not depend, as all other privileges do, on the favor of its claims (Art. 1983–1984 C. C.), but on the accident whether there are or are not special privileges claimed on the property of its debtor. This difficulty, leading to a subversion of all principles with regard

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to privileged claims, disappears if we apply these words: "*in the absence of any special privilege*," to the special privileges of the Crown only, using these words in contradistinction to the general privileges of the Crown and to distinguish the order or rank appertaining to each.

Again, there are two classes of chirographic creditors: those that have a preference or privilege, and those that have none.

Guyot, in his Rép. Vo. Chirographaire, § 7, says: "On " peut distinguer deux sortes de créances chirographaires; " les unes n'ont aucun droit de préference par elles même; " on les appelle *chirographaires ordinaires*: les autres qui par " leur objet ont un droit de préférence, soit sur la masse " entière des biens, soit sur certains biens particulières; " on les nomme privilégiées. Les frais d'enterrement, les " honoraires des médecins de la dernière maladie sont de " cette dernière classe." The words, *chirographic creditors*, have been used in the article without any restriction or qualification whatever. Is the preference to be given to the claims of the Crown under Art. 611, C.P.C., to supersede all other privileges, even those which from the remotest period have been with us considered as sacred, such as the privileges for funeral expenses, and of physicians and servants' wages? I am glad to find that we are all agreed on this, that the words *chirographic creditors* in this article do not apply to all *chirographic creditors*, but only to the ordinary *chirographic creditors* who have no privileged claims. We are also all of opinion that the word *defendant* in this article is to be interpreted as meaning the debtor of the claim of the Crown whether such debtor be a defendant or not.

All this shows that this short article is not a very clear one, and that to make sense of it, the process of interpretation must be applied to it, to a considerable degree: for however obscure or insufficient a law may be, we cannot refuse to adjudicate (Art. 11, C.C.), and it is our duty to interpret a doubtful or ambiguous law, so as to fulfil the intention of the legislature and to attain the object for which it was passed.—(Art. 12, C.C.)

Another rule of interpretation applying to the Civil Code and to the Code of Civil Procedure, as laid down by the Lords of the Privy Council in the case of *Carter & Molson* (8, H. of L. and P. C. Cases, 530), is, that although the Code of Civil Procedure has come into force later than the Civil Code, the two form part of one general system, and must stand and be construed together as if they formed but one code.

The object of the Civil Code is to fix the rules and principles by which the rights of individuals are to be determined; that of the Code of Civil Procedure is to establish rules for the exercise of these rights before courts of justice. Therefore, whenever a provision is found in the Civil Code, the intention of the legislature must necessarily have been thereby to confer or determine a right, and when it is found in the Code of Civil Procedure the intention must have been to provide a remedy for enforcing rights and not to alter existing rights or to confer additional ones.

There is an incident with reference to this Art. 611, bearing upon the intention of the legislature, which has some significance.

The Code was prepared under a statute which authorised the Commissioners to embody in the Code of Civil Procedure for Lower Canada, all the laws then in force in the Province relating to procedure in civil matters and cases, and to suggest such amendments as they thought desirable, with their reasons, and to report to the Governor—(Cons. Statutes for L.C., chap. 2, ss. 5, 6, and 8). The code so prepared was submitted to the legislature and adopted with such amendments as were thought necessary, and referred back to the Commissioners under the statute 29 and 30, Vict., ch. 25, to incorporate the amendments with the Code, the Commissioners being authorised to alter the numbering of titles and articles of the Code or their order, to correct any error whether of commission or of omission, or any contradiction or ambiguity, in the original Roll, *but without changing its effect*;—which Roll so corrected, being signed by the Governor and countersigned by the Provin-

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cial Secretary or Assistant, and deposited with the Clerk of the Legislative Council would become law as the CODE OF CIVIL PROCEDURE OF LOWER CANADA, from a day to be fixed by Proclamation. When this statute was passed this provision, now comprised in Article 611, was neither in the original Roll nor in the amendments adopted by the legislature. It was when the Commissioners were embodying in the original Roll the amendments adopted by the legislature, and making the necessary corrections under the authority they had received by statute, that article 611 was introduced into the Code. It cannot be said that the legislature intended to alter not only the provisions of the Code of Civil Procedure, but also those of the Civil Code by an addition made under these circumstances and of which it knew nothing, nor is it conceivable that the Commissioners themselves, in direct contravention of the instructions they had received, not to alter the effect of the Code as adopted by the legislature, should have intentionally destroyed the whole economy of Article 1994 of the Civil Code on privileges, by introducing into the Code of Civil Procedure a disposition foreign to its object, and creating a most extraordinary and important privilege in favor of the Crown. The absence of any intention to change the law in the manner it is pretended it was changed by Article 611, is made more manifest, if possible, by the fact that on the very day that the legislature adopted the Code of Procedure and its amendments, and directed the Commissioners to make no correction which would alter its effect, it passed a statute, the 29th and 30th Vict. ch. 43, by which it abolished the privileges attached to the claims of the Crown in Upper Canada, and in that respect placed the claims of the Crown on the same footing as those of private individuals. This is perhaps an unimportant circumstance, but still it is another evidence that the legislature could have no intention to extend, by the Code of Civil Procedure, the privileged claims of the Crown established by the Civil Code.

There are besides several articles in both codes on this very question of privilege, which bear intrinsic evidence

that there was no intention of changing, limiting, or extending by the Code of Procedure the privileges established by the Civil Code. Art. 2008 of the Civil Code says: "Other rules *concerning the collocation of certain privileged claims*, are to be found in the Code of Civil Procedure."

The rules in the Code of Civil Procedure were therefore only intended as "instructions to regulate" the collocation of privileged claims.

Then article 605 of the Code of Civil Procedure enacts that: "the moneys are distributed according to the order prescribed in the title OF PRIVILEGES AND HYPOTHECS and the title OF MERCHANT SHIPPING in the Civil Code, and in the provisions hereinafter contained." Here again is an express reserve of the privileges settled by the Civil Code, and a declaration that they are to be collocated according to the order therein prescribed. There is here no indication of an intention to change or extend them by Art. 611, coming as it does almost immediately after this express declaration.

Apart from the question of intention, which according to our article 12, C. C., is the primary and controlling rule of interpretation of our laws, is there anything in article 611 to repeal or supersede the privileges of the Crown against its *comptables*, and to substitute another and more extended privilege in its place?

As we have already seen, the two codes must be construed together, and by placing in juxtaposition the several articles of both referring to the privileged claims of the Crown, we shall be able to arrive at their exact meaning. The first of these articles is article 1989, which in general terms refers to statutes creating special privileges in favor of the Crown. Art. 607 of the Code of Civil Procedure completes this article by enumerating the subjects to which these statutes refer.

Then article 1994, C. C., confers on the Crown a general privilege over all the property of its *comptables*. By adding to this article the provision of art. 611 of the Code of Civil Procedure, the two will read as follows; Art. 1994, C. C. "The claims which carry a privilege upon moveable pro-

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perty are the following, and when several of them come together they take precedence in the following order, &c. . . . 10. *The claims of the Crown against persons accountable for its moneys.*—Art. 611, C.C.P., "*In the absence of any* "*special privilege, the Crown has a preference over chirographic* "*creditors for sums due to it by the defendant.*"

The meaning of these several articles is that the Crown, by article 1989, has special privileges affecting particular property, which according to Art. 607, are to be paid by preference over all other creditors on the property subject to them, the Art. 1989 establishing the right and Art. 607 the rank. Then article 1994 gives to the Crown a general privilege against its *comptables*, that is, a privilege attaching to all the property of its *comptables*, which in its order comes after all the other privileged claims, and article 611, which is a mere rule of procedure, a direction to the officers of the court how to distribute the moneys levied, (see title of the section and paragraph in which it is placed), says: "*In the absence of any special privilege*, (that is in the case that the Crown has no special privilege, for if it had any, its claims should, according to articles 1989 and 607 be paid out of the proceeds of the property subject to such special privilege in preference to all other creditors) *the Crown has a preference over chirographic creditors*, (that is ordinary chirographic creditors,) *for sums due to it by the defendant*" (that is, by the debtor of a privileged debt under art. 1994.)

My reading of these combined articles concerning the privileged claims of the Crown is, that when the Crown has a special privilege, its claim shall, according to Art. 607, be paid by preference to all other creditors, (which terms may have again to be limited in certain contingencies not occurring in the present case), and that when the Crown has no special privilege, its other privileged claims, that is those mentioned in art. 1994 shall be paid in preference to those of the ordinary chirographic creditors.

Effect is thus given to the provisions of both codes according to their respective objects and to the intention of the legislature.

It may be said that it is objectionable to restrict and alter the ordinary meaning of words used in Acts of the legislature. It would, no doubt, be better if all the Acts of the legislative bodies were so clearly expressed that it was never required to apply to them any of the numerous legal rules of interpretation to understand their exact meaning; but Art. 611 is not of that class, and in the judgment about to be rendered in this case, the court, by deciding that the Merchants Bank is to be paid its claim in preference to the Crown, is obliged to restrict, as I do, to ordinary creditors, the meaning of the words *chirographic creditors*, and by deciding that the Crown has a privilege on the property of the Exchange Bank, it expressly rules that the word debtor must be substituted for defendant—there being no defendant in this case. It also leaves out the words "*In the absence of any special privilege*," which, I think, are to be used to limit to other privileged claims of the Crown, the preference mentioned in Art. 611.

The principal difference between the members of the Court is, that I have applied the rules of interpretation in this case, so as to keep intact the provisions of both codes, while the majority of the Court apply them so as to destroy the provisions of Art. 1994, C. C. concerning the privilege of the Crown, and to substitute a more extended privilege in its stead, by an article in the Code of Procedure which has a totally different object.

Troplong, des Priviléges and Hypothèques, Nos. 64 and 65, discusses a case arising out of the French codes, very analogous to the present one. By Art. 2101 and 2102, C. N., certain privileges were ranked prior to the privilege of the landlord, and in Art. 662, of the Code of Civil Procedure, it is declared that the costs of suit are to be paid, by privilege, before all other claims, except that for house rent,—and the point is examined whether this last article had the effect of changing the priority of privileges as established by the articles 2101 and 2102 of the Civil Code; and he concludes by saying that this cannot be: "*A moins de vouloir tuer l'esprit de la loi avec la lettre judaïque-*

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ment appliquée." In his observations on this point, Troplong cites Pothier, who, commenting on Art. 458, (*sic*) of the Custom of Paris, which establishes a privilege in favor of the Maître d'Hotel "*avant tout autre*" says: "cet article "s'entend que des créanciers ordinaires, et non de ceux "qui auraient un privilége plus fort que les Seigneurs "d'Hôtel."

These are remarkable applications of the power of interpretation of ambiguous or conflicting enactments: and they are in cases so analogous to the present case that they may well be followed. As Portalis said in his Discours Préliminaire sur le Code Civil (1st Locré, p. 264, No. 17). "Il y a une science pour le législateur, comme "il y en a une pour les magistrats, et l'une ne ressemble "pas à l'autre. La science du législateur consiste à trouver "dans chaque matière les principes les plus favorables "au bien commun; la science du magistrat est de mettre "ces principes en action, *de les ramifier, de les étendre* par une "application sage et raisonnée aux hypothèses privées, "*d'étudier l'esprit quand la lettre tue*, et de ne pas s'exposer "au risque d'être tour à tour esclave et rebelle et de "désobéir par esprit de servitude."

At p. 265, the same learned jurist says: "Dans cette im-"mensité d'objets divers qui composent les matières "civiles, et dont le jugement, dans le plus grand nombre "de cas, est moins l'application d'un texte précis, que la "combinaison de plusieurs textes qui conduisent à la "décision bien plus qu'ils ne la renferment, on ne peut "pas plus se passer de jurisprudence que de lois."

When the law is obscure it has to be interpreted, when it contains dispositions which apparently conflict with each other, such dispositions have to be compared so as to ascertain their combined meaning; in my efforts to do so, I have not been able to satisfy myself that it had been the intention of the legislature to change by Art. 611 of the Code of Civil Procedure, not only the provision of Art. 1994 of the Civil Code with reference to the general privilege of the Crown, but also the whole basis and principle on which this privilege rests, nor that in

reality the article had such effect. I am therefore of opinion that the Crown has no priority, preference or privilege to be paid out of the assets of the Exchange Bank before the ordinary creditors of the Bank; that they should all be paid, *pari passu*, in proportion to the amount of their respective claims, and that the judgment of the Court below should be confirmed.

RAMSAY, J.:—

There are two cases, one for a deposit by the government of Canada in the Exchange Bank, insolvent; the other for a deposit by the government of the province of Quebec.

No distinction is made between the claims of the two governments, and I think rightly, for it appears to me, that although the Queen is not directly a part of the local legislature or government, yet that the powers of the local legislatures and governments being dismemberments of the sovereign authority, the same reason exists for allowing to the local government those privileges which appear to be the natural appanage of sovereignty. I therefore think that if the claim is founded in the Dominion it is so also in the local government, within its territorial limits at all events.

The claim is this, that the debt due to the government is privileged and takes precedence of all chirographic debts whatever. The pretention of the respondents is, that the government has no privilege at all, except when discussing the moveable property of its *comptable*, and that then it has a limited privilege. The Merchants Bank contends, moreover, that the holders of the notes of the insolvent bank have a special privilege which overrides any other privilege over the assets of the bank.

In process of the argument in support of these pretentions, three questions have been specially urged on our attention:

First. It is submitted, whether the public law of the Empire or the municipal law of the province shall govern the proprietary rights of the Crown in this province.

Secondly. Whether the article 1994, C.C. is drawn under

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the influence of the ideas of the English public law, and consequently that it is to be interpreted in consonance with these ideas, and hence that it gives the Crown a special privilege over all its debtors' moveables, no matter what be the cause of the indebtedness.

Thirdly. Whether in any case the article 611, C. C. P., does not trench every difficulty by its express words.

The first of these questions has been so frequently under the consideration of the courts of this province, as to render it impossible for us to decide otherwise than that the privilege of the Queen seeking ordinary proprietary rights in our courts, is that derived from the King of France. In the case of *Monk & The Attorney General* it was formally decided in 1874, "that the privilege of the Crown for its claims over those of private competing creditors, is to be governed by the law of Canada and not by the law of England," 19 L. C. J. 71. In the civil code, with the assent of the whole legislature of the old Province of Canada, it was declared as a part of the municipal law of Lower Canada that "in default of a surviving consort the succession falls to the Crown," article 637. And in a contest between the Attorney General of the Dominion and the Attorney General of Quebec, we awarded the vacant estate of F. to the local Government. In a similar case arising in Ontario, the Court of Appeal decided as we did, implying that it was not a right derived from the greater prerogatives of the Crown; and that decision, being reversed by the Supreme Court, the Privy Council re-affirmed the judgment of the Ontario Court of Appeal. In 1828 it was held that the Crown could recover interest as any other could under our municipal law. *The Attorney General & Black*, S. R. 324. And in *Ross & De Lery et al.*, we held, not two years ago, that whatever might be the right of the King of England to mines and minerals, by the laws of England, as the successor of the King of France, in this province his rights (greater or less) were those of the King of France. 6 Leg. News, 407.

The second point appears to me to be governed by what has been said. At all events, it would require words very

distinctly borrowed from the law of England to induce a court to seek for the interpretation of these words in that law, which unquestionably is not our law on the matter. But really the word "accountable," *comptable*, is not a term of the English law to describe the relation of the collector of the revenue to the Sovereign; but it is a term of the French law. Again, if we take accountable in its ordinary sense, was it ever pretended that a debtor was accountable to his creditor? It would be a perversion of language to maintain such a proposition. Again, it is said that if the French law is to rule, the bank, in which the government deposits, is a *comptable* by statute. There is no such statute; there is a law ordering the *comptable* to deposit in a bank under certain circumstances, but the bank remains banker and is never *comptable*. I may add that, so far as the local act is concerned, it would be *ultra vires* to change the character of a bank, and to alter its affinities with the civil law. I am, therefore, of opinion that article 1994 does not support the pretention of the appellant.

We come now to the third question, that is, the effect of article 611 C. C. P. We have heard the presence of this article explained, or attempted to be explained. It seems probable that it was introduced after the bill had passed making the Code law. The story is this: article 611 C. C. P. was not in the roll of the code deposited in the Legislative Council. It was desired to add to the Code of Civil Procedure other amendments. These were passed and set forth in a schedule to the act 29 & 30 Vic., ch. 25, of the old Province of Canada. By the act itself, the commissioners were authorized to incorporate these amendments in the Code, changing the form but not the substance, the Code was then to be printed, and, as printed, it was to be law.

When the printed form was fully investigated doubts naturally arose as to whether the Commissioners had exercised the powers delegated to them precisely. It is perfectly certain they had not done so as to Art. 611, which is as conspicuous for its absence from the Schedule to the Act of the 29 & 30 Vic., as from the original roll of the

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Code. It is totally new law, as has been shown, I think, clearly, and it never received the least legislative sanction. Had matters remained in this condition, it would not be difficult to deal with Art. 611, C.C.P. It was a manifest addition to the Act, and must have been excised like any addition to the Parliamentary roll. But to avoid the litigation arising from this extraordinary source, the Legislature of this Province passed an Act, 31 Vic., ch. 7, by the 10th Section of which it is provided that:—"The Civil Code of Lower Canada and the Code of Civil Procedure of Lower Canada, *as printed before the Union* by the Queen's printer of the former Province of Canada, have been and are in force as law in this Province; and no Act or Provision of the Legislature in any way affects any Article of either of the said Codes unless such Article is expressly designated for that purpose." Now it is contended that we are to set this Statute aside, in so far as regards Art. 611, C.C.P. It would doubtless be very equitable to do so if we have the necessary authority; but I know of no principle of interpretation that will justify a Court in effacing or modifying the disposition of a Statute so as to destroy its effect in a particular case of evident hardship. It would be easy, but totally useless to go through the cases, for they are all one way. The clear disposition of a modern Statute is never set aside. The case most in point I know of is *Carter & Molson*, (1) which went to the Privy Council. There was no doubt as to the intention of the Legislature. The Civil Code had recognized the imprisonment of the debtor in cases similar to the one in question, "and in the manner and form specified in the Code of Civil Procedure," (Art. 2274.) The Code of Civil Procedure said nothing about the manner and form. There was no special need of articles to declare the manner and form of sending a man to jail; yet neither this Court nor the Privy Council would say that this allusion to the Code of Civil Procedure was unnecessary, or merely explanatory of what appears there. This was going a long way in one direction, but how in face of

(1) 6 Leg. News, 189; 8 H. of L. & P. C. Cases, 530.

such a ruling on a question of the general public law of the empire, we could venture to sacrifice 611 of the Procedure Code I cannot see.

It has been said in the dissenting opinion that art. 611 is not clear. I cannot see any obscurity. Whoever drew it evidently was fully conscious of what he was doing. Among the articles of the Code of Civil Procedure, art. 611 seems to me to be conspicuous for its clearness. It is a very evil innovation but it is very well expressed. "In the absence of any special privilege, the Crown has a preference over chirographic creditors, for sums due to it by the defendant." We are therefore constrained, most unwillingly, to reverse the judgment as far as regards the unprivileged claims. The judgment will distinguish as to the case of the Merchants Bank claim for preference as to the notes in circulation of the insolvent bank, which are protected by a special privilege, to which the Crown privilege must yield.

The following is the text of the judgment:

"Considering that in the absence of any special privilege, the Crown has a preference by law over chirographic creditors for sums due to it by the insolvent;

"Considering that the Merchants Bank of Canada, as a holder of notes of the said Exchange Bank of Canada, amounting to the sum of $3,050, without security, has a special privilege for the repayment of the said sum of $3,050;

"And considering that there is no error in the judgment of the Court below, to wit, the judgment of the Superior Court rendered at Montreal, on the 1st day of December, 1884, in so far as the said judgment maintained the intervention of the said Merchants Bank, the Court here doth so far affirm the said judgment, and this Court doth further recommend that costs may be allowed in favor of the said Merchants Bank as well in the Court below as in this Court;

"And considering that the respondents Louis H. Massue and Wilmer C. Wells have invoked no special privilege in and by their petitions and interventions, and are

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in fact simple chirographic creditors of the said Exchange Bank;

"And considering, therefore, that there is error in the said judgment rendered on the 1st day of December, 1884, as far as regards the contestation of Louis H. Massue and the intervention of the said Wilmer C. Wells, doth so far reverse the same, and proceeding to render the judgment which the said Superior Court ought to have rendered; doth dismiss the contestation of the said Louis H. Massue with costs as well of the Court below as those incurred in this Court, and doth further reject the intervention of the said Wilmer C. Wells with costs as well of the Court below as in this Court. (Hon. Sir A. A. Dorion, C. J., dissenting).

Judgment reversed.

L. R. Church, *Q. C.*, attorney for appellant.

S. Bethune, *Q.C.* and *D. Macmaster*, *Q. C.*, for the liquidators of the Exchange Bank, and also for Mr. Massue and the Merchants Bank.

N. W. Trenholme for intervenant Wells.

(J. K.)

21 mars 1885.

Coram SIR A. A. DORION, J.C., MONK, TESSIER, CROSS and BABY, JJ.

LOUIS RAYMOND DIT LAJEUNESSE
(*Demandeur en Cour inférieure*).
APPELANT;

ET

JOSEPH LATRAVERSE
(*Défendeur en Cour inférieure*),
INTIMÉ.

Faits et articles—Divisibilité de l'aveu—Réponse invraisemblable —Preuve contraire—Circonstances—Art. 1243 *C. C. et* 231 *C. P. C.*

JUGÉ:—Que l'aveu d'une partie qui reconnaît avoir reçu une somme d'argent réclamée par l'action, mais qui prétend avoir reçu la dite somme à titre de don et non à titre de prêt, peut être divisé lorsque cette prétention paraît tout à fait invraisemblable en vue des circonstances de la cause et du caractère des parties. Et l'admission contenue dans l'aveu ainsi divisé peut servir de commencement de preuve par écrit, de manière à permettre l'introduction de la preuve testimoniale pour contredire la prétention invraisemblable de la partie interrogée, et pour établir les véritables circonstances.

Appel d'un jugement de la Cour Supérieure à Sorel, rendu le 2 novembre 1881, renvoyant l'action de l'appelant.

Les opinions des juges de la Cour d'Appel expliqueront suffisamment les faits de la cause, et les questions de droit résolues.

BABY, J.:—

L'appelant poursuit l'intimé pour une somme de $4,022.03, composée de $3,000 pour argent prêté, $336.05 pour le prix de meubles et effets mobiliers vendus, et $885.98 pour intérêt sur le dit argent prêté.

L'intimé plaide qu'il a reçu la dite somme de $3,000 et les dits effets mobiliers, mais que c'est à titre de *don* qu'il les a reçus.

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L'appelant, n'ayant pas d'acte, ni de reconnaissance écrite, de ces prêts et avances à l'intimé, a dû s'en rapporter à l'aveu judiciaire de l'intimé. Celui-ci, interrogé sur faits et articles, a donné des réponses conformes à son plaidoyer: il admet avoir reçu l'argent et les effets mais à titre de don.

La question qui se présente est celle de la divisibilité de l'aveu. La règle générale est contenue dans l'article 1243 du Code Civil:—"L'aveu est extra-judiciaire ou judi-" ciaire. Il ne peut être divisé contre celui qui le fait." Mais il y a des exceptions à cette règle générale. D'après l'article 231 du Code de Procédure Civile, "La réponse " de la partie à une question" (sur faits et articles) " peut " être divisée dans les cas suivants, d'après les circons-" tances et suivant la discrétion du tribunal:

" 1. Lorsqu'elle contient des faits étrangers à la contes-" tation liée;

" 2. Lorsque la partie contestée de la réponse est invrai-" semblable ou combattue par des indices de dol ou de " mauvaise foi ou par une preuve contraire;

" 3. Lorsqu'il n'y a pas de connexité ou de liaison entre " les faits mentionnés dans la réponse."

C'est sur le 2ème paragraphe de l'article 231 que se base l'appelant. Il prétend que la théorie de l'intimé quant au prétendu don des $3,000 et des effets est tout à fait invraisemblable d'après les circonstances de la cause, et qu'elle est en outre combattue par une preuve contraire.

Comme on l'a vu, l'article 231 C. P. C. laisse la question à la discrétion du tribunal. La Cour de première instance, dans l'exercice de son pouvoir discrétionnaire, a refusé de diviser l'aveu du défendeur, et a renvoyé l'action. C'est toujours avec beaucoup d'hésitation et de répugnance que nous nous décidons à déranger un jugement sur une question d'appréciation comme celle-ci, mais dans l'espèce actuelle un examen attentif de toutes les circonstances nous amène irrésistiblement à une conclusion différente de celle de la Cour Supérieure. Voyons quelles sont ces circonstances.

Il est prouvé que l'appelant est un vieux garçon éco-

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nome et avare, qui a l'habitude de prêter de l'argent à intérêt sans prendre de reçus ou de reconnaissances quelconques. Son avarice est notoire: on ne l'a jamais vu donner un sou à personne. Il a une mère qu'il fait vivre, et plusieurs frères, sœurs, neveux et nièces pauvres.

L'intimé n'était lié avec lui par aucune parenté, aucun devoir rendu, aucune relation d'amitié avec lui ou sa famille, et pourtant s'il fallait croire l'histoire racontée par l'intimé, cet étranger avare et économe aurait un beau jour offert de lui donner $3,000 pour acheter une terre qu'il désirait, et à une seconde entrevue lui aurait actuellement donné ce montant. Il y a eu, dit l'appelant, un paiement de $200 fait à compte de cette somme de $3,000 qui était prêtée à l'intimé, mais l'intimé prétend qu'il a prêté à l'appelant deux sommes de $100 dont ce dernier avait besoin. Pour juger de la vraisemblance de cette histoire il suffit de se rappeler que l'appelant est un homme riche qui prête constamment son argent, tandis que l'intimé est commis de vivres (*steward*) à bord d'un bateau à vapeur, avec un salaire de $350 par année. On voit que l'histoire de ce dernier est un véritable roman, et qu'elle a bien le caractère d'invraisemblance prévu par l'art. 231 C. P. C.

Mais il y a plus. Le dossier contient aussi une preuve contraire. Le témoin Lachapelle dit que l'intimé lui a déclaré, dans le temps de l'achat de la terre en question, qu'il *empruntait* l'argent de l'appelant à 5 pour cent.

En présence de toutes ces circonstances nous croyons que la partie contestée de la réponse de l'intimé est tout à fait invraisemblable, et qu'elle est combattue par une preuve contraire. Nous sommes donc d'opinion que l'aveu aurait dû être divisé et vous infirmons en conséquence le jugement de la Cour Supérieure.

MONK, J. :—

Je ne crois pas devoir différer du jugement de cette Cour, mais je ne puis pas m'empêcher d'exprimer la grande difficulté que j'éprouve à m'y joindre. La cause est vraiment extraordinaire et offre tous les caractères d'un

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roman. Je partage tout à fait l'opinion qui vient d'être exprimée par mon honorable collègue quant à la nature invraisemblable de l'histoire racontée par l'intimé, et si la cause se présentait à moi comme juge de première instance je n'aurais aucune hésitation à déclarer l'aveu divisible, mais ma difficulté provient du fait que la question est laissée à la discrétion du tribunal, et que la Cour Supérieure a déjà fait cette appréciation.

TESSIER, J.;—

La présente cause est très importante au point de vue du droit. La question de la divisibilité de l'aveu n'est pas tout à fait la même dans notre code et dans le Code Napoléon. Au principe général de l'indivisibilité de l'aveu contenu dans l'article 1243 de notre code, et dans l'article 1356 du Code Napoléon, nos codificateurs ont ajouté les exceptions mentionnées à l'art. 231 de notre Code de Procédure Civile. Il s'agit en cette cause de décider si l'aveu peut être divisé en vertu des provisions de l'art. 231 C. P. C.

Le défendeur, interrogé quant au prêt que le demandeur prétend lui avoir fait, répond qu'il n'a jamais emprunté, mais que l'argent lui a été donné. Si le demandeur n'avait fait aucune preuve indépendante il est probable que cet aveu serait indivisible. Mais dans le cas actuel il y a invraisemblance et preuve contraire. C'est ce qui rend l'aveu divisible, et permet au demandeur de s'en servir en guise de commencement de preuve par écrit. Maintenant la preuve testimoniale faite en cette cause pour compléter le commencement de preuve résultant de l'aveu est-elle suffisante? Nous croyons que oui, et nous renversons le jugement *à quo*.

SIR A. A. DORION, J.C.:—

Il n'y a pas de question plus difficile à résoudre que celle de la divisibilité de l'aveu. Comme l'a expliqué mon honorable collègue qui vient de parler, le nouveau droit français diffère de l'ancien sur ce point, et notre code contient des exceptions qu'on ne trouve pas dans le Code Napoléon. Dans l'espèce actuelle nous divisons l'aveu

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pour deux raisons. Premièrement parce que l'histoire du prétendu don est tout à fait invraisemblable, et deuxièmement parce que deux témoins prouvent que l'argent n'a pas été donné, mais qu'il a été prêté. Nous disons ceci à l'égard des $3,000 prêtées, car quant à l'autre réclamation pour les effets mobiliers vendus, nous ne trouvons aucune preuve indépendante de l'aveu, qui est en lui-même insuffisant pour établir une vente de ces effets.

Le jugement formel de la Cour d'Appel est dans les termes suivants:—

" Considérant que l'appelant réclame par cette action, 1. une somme de $3,000 pour argent prêté à l'intimé; 2. une somme de $336.05 pour le prix de meubles et effets mobiliers vendus et livrés et deniers avancés au dit intimé; et 3. une somme de $885.98 pour intérêt sur les dites sommes prêtées—moins la somme de $200 reçue à compte;

" Et considérant que l'intimé interrogé sous serment a admis qu'il avait reçu de l'appelant la somme de $3,000 et les meubles et effets mentionnés en la déclaration, mais en affirmant et soutenant que cette somme de deniers et ces effets mobiliers ne lui avaient pas été prêtés, mais qu'ils lui avaient été donnés par l'appelant;

" Et considérant que les circonstances sous lesquelles l'intimé prétend que cette somme de deniers et ces effets mobiliers lui ont été donnés sont tellement invraisemblables que l'appelant était fondé à prouver par témoins les circonstances dans lesquelles la somme et les effets dont le prix est réclamé par l'appelant ont été fournis et livrés au dit intimé;

" Et considérant que tant par les réponses du dit intimé que par la preuve testimoniale produite en cette cause, l'appelant a établi qu'il avait prêté au dit intimé la dite somme de $3,000, mais qu'il n'a pas prouvé que cette somme ait été prêté à intérêt, ni qu'il ait vendu ou prêté les meubles et effets dont il réclame le prix;

" Et considérant que l'appelant a le droit de recouvrer de l'intimé la dite somme de $3,000 moins celle de $200 qu'il a reconnu avoir reçue du dit intimé, mais non celle

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de $336.05 qu'il réclame pour le prix des meubles et effets fournis et livrés à l'intimé ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour de première instance, à Sorel, dans le district de Richelieu, le deuxième jour de novembre 1881 ;

" Cette Cour casse et annule, etc."

Jugement renversé.

J. B. Brousseau, pour l'appelant.

A. Gagnon, pour l'intimé.

(E. L.)

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21 mars 1885.

Coram DORION, J.C., MONK, RAMSAY, CROSS, and BABY, JJ.

L'HON. ISIDORE THIBAUDEAU ET AL.
(*Demandeurs en Cour inférieure*),
APPELANTS ;

ET

J. W. MILLS ET AL.
(*Défendeurs en Cour inférieure*),
INTIMÉS.

Vente—Revendication—Privilége—Faillite—Insolvabilité—Livraison—Art. 1998, *C. C.*

JUGÉ :—1o. Que les provisions de l'article 1998 C. C. limitant l'exercice du privilége du vendeur aux quinze jours qui suivent la vente dans les cas de faillite, s'appliquent non seulement au cas de faillite sous l'empire d'un acte de faillite, mais au cas d'insolvabilité sous le droit commun, quand un commerçant cesse ses paiements (Art. 17, § 23).

2o. Que lorsque l'acheteur y consent, le vendeur qui est dans les conditions voulues pour revendiquer, peut se faire remettre à l'amiable les marchandises vendues, sans avoir besoin de les faire saisir par voie de revendication.

3o. Que l'expression "les quinze jours qui suivent la vente" dans le dit art. 1998, doit s'entendre de la vente parfaite, et partant si les marchandises sont vendues au poids, au compte ou à la mesure, et non en bloc (Art. 1474, C. C.), le délai pour revendiquer ne commencera à courir que du moment où elles auront été pesées, comptées ou mesurées.

Les faits de la cause sont suffisamment expliqués dans

les opinions suivantes. Le jugement de la Cour Supérieure est rapporté au 6 Legal News, p. 117.

DORION, J. C. :—

Cette action a été prise par les appelants pour le bénéfice commun des créanciers d'une société commerciale qui existait à Montréal en 1882 sous le nom de Chaput & Massé, et a pour but de faire annuler une transaction entre cette société et les intimés.

En juin 1882 Chaput & Massé reçurent des intimés un ordre pour des marchandises pour une somme de $726.29, ces marchandises devant être livrées plus tard, et étant payables à quatre mois du 1er octobre 1882. La livraison n'a eu lieu que le 31 juillet. Le 14 août suivant, lorsque Chaput & Massé étaient insolvables, les intimés ont envoyé un de leurs employés pour demander que les marchandises ainsi livrées leur soient remises, et, comme Chaput & Massé y consentaient, elles ont été enlevées et reprises ce jour même par les intimés.

Les appelants demandent que ces marchandises ou leur valeur soient remises parmi les autres biens de la société Chaput & Massé pour le bénéfice des créanciers. A cette action les intimés plaident qu'ils ont seulement exercé le privilége de revendication accordé au vendeur non payé par les articles 1998 et suivants du Code Civil.

Les appelants répondent que, Chaput & Massé étant en faillite, les intimés n'ont pas agi dans le délai prescrit par l'article 1998, qui se lit comme suit: "Le vendeur d'une chose non payée peut exercer deux droits privilégiés: 1o. Celui de revendiquer la chose; 2o. Celui d'être préféré sur le poix. *Dans les cas de faillite*, ces droits ne peuvent être exercés que dans les quinze jours qui suivent la vente."

La Cour inférieure a écarté cette réponse et a décidé que l'article 1998 n'est pas applicable au cas actuel, attendu que l'expression "faillite" dans cet article veut dire une faillite en vertu d'un acte de faillite, et que, comme nous n'avons plus d'acte de faillite depuis 1878, Chaput et Massé n'étaient qu'*insolvables*, et partant le ven-

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deur non payé était toujours à temps pour exercer son privilége.

Nous ne concourons pas dans cette partie du jugement. Nous croyons, au contraire, que Chaput et Massé étaient " en faillite " au sens de l'article 1998, et que les intimés étaient par conséquent tenus d'exercer leur privilége, soit de revendication ou de préférence sur le prix dans les quinze jours de la vente. Le terme " faillite " est défini par l'acte 17, § 23, du Code Civil, comme étant " l'état d'un commerçant qui a cessé ses paiements," et nous croyons que le législeur avait l'intention d'appliquer l'article 1998 à tous les cas où l'acheteur n'est pas en état de rencontrer ses paiements, soit qu'il tombe sous l'empire d'une loi de faillite ou sous le droit commun.

Mais nous sommes d'accord avec la Cour inférieure quand elle décide que les intimés ont agi dans le délai de quinze jours établi par l'art. 1998. Dans le cas actuel il n'y avait aucune nécessité de revendiquer les marchandises par une action, vu que l'acheteur consentait à les remettre volontairement. Il faut observer que dans les cas de faillite le droit de revendication doit être exercé " dans les quinze jours qui suivent *la vente*," tandis que dans les cas ordinaires " la revendication doit être exercée dans les huit jours *de la livraison*," d'après l'article 1999.

Cette différence peut avoir des conséquences importantes, car depuis le code la vente est parfaite sans la livraison par le seul consentement des parties (art. 1472 C. C.). Dans cette cause les appelants prétendent que, quoique la livraison n'ait eu lieu que le 31 juillet, la vente a été faite et parfaite au mois de juin précédent lorsque Chaput et Massé ont accepté l'offre des intimés de leur vendre les marchandises en question. Mais il y a une distinction à observer. Il est vrai que depuis le code la vente est parfaite par le seul consentement des parties, mais cette règle ne peut s'appliquer que lorsque l'objet de la vente est déterminé et susceptible d'être identifié. Si Mills & Hutchison avaient vendu en bloc à Chaput et Massé un lot de marchandises déterminé la vente aurait été parfaite, mais s'ils leur avaient vendu un

certain nombre de verges de drap ou de boîtes de coton, la vente n'aurait été parfaite que lorsque le nombre de verges aurait été mesuré, ou le nombre de boîtes compté et mis à part. C'est le cas prévu par l'article 1474 du Code Civil.

Ici il n'y a pas eu d'objet certain avant le 31 juillet, quand les marchandises ont été mises à part pour Chaput et Massé avant qu'elles leur aient été livrées.

Pour ces raisons nous croyons donc que les intimés ont exercé leur privilége dans les quinze jours qui ont suivi la vente et que le jugement de la Cour inférieure qui a renvoyé l'action des appelants, doit être confirmé avec dépens.

RAMSAY, J. :—

On the 10th June, 1882, a contract of sale was made between Chaput & Massé and respondent, by which the latter undertook to sell certain merchandize to be delivered in the month of September, from which time Chaput & Massé were to have four months to pay therefor. On the 31st July or 1st August the goods were actually delivered and taken into the warehouse of Chaput & Massé and piled up there, and part of them marked with their prices. They had undergone no other change—they were delivered unpacked, and it seems there was no difficulty as to their identification. On the 14th August, Chaput & Massé being unable to pay for them, they cancelled the sale and permitted respondents to take back the goods, which was done. The same day they called a meeting of their creditors and assigned. Mr. Mills was summoned to that meeting, but, he says, he did not actually know that Chaput & Massé were insolvent when the goods were given back.

Appellants contend that this transaction took place after Chaput & Massé became insolvent and that the defendants were aware of it, and that it was a preferential payment prohibited by art. 1036, C. C.

Respondents say that the sale was conditional, the de-

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livery by error, and that giving back goods in this way to the unpaid vendor is not a payment at all within the meaning of art. 1036 C.C., and that the unpaid vendor can always demand the dissolution of the sale while goods are in the possession of the vendor. The judge in the Court below held:

"Que la dite transaction et la remise des dites marchandises ont eu lieu dans les quinze jours de la vente et livraison."

I don't think it is proved that the sale was conditional as regards delivery, or consent of Mr. Tranchemontagne. It is proved that one of the defendants put a warning in the book that the bill due on the 18 July should be paid, and that the delivery clerk should speak to Mr. Tranchemontagne before delivering the new order, but Massé and Chaput were not privy to that memorandum, and therefore it did not affect the contract. On the contrary if it was fixed as a stipulation that goods were not to be delivered till September, why allude to the payment of the bill due on the 18th July? It appears then that there was no obligation to deliver before September, but that is quite another thing. Again Tranchemontagne's story, is that they were to see Mr. Mills, but that stipulation ceased to be of any avail the instant the delivery was satisfied by the respondents. It is idle to say the delivery clerk was not authorized to execute his master's bargain. Such a delivery could not possibly be error.

I cannot entirely agree with the learned judge in all his *considérants* as to art. 1998 C. C. The French version uses the word *faillite* it is true, and the English version uses the word "insolvency." So we call it the *insolvent* act in English and in French *l'acte de faillite*. The articles, as originally drafted for the avoidance of contracts, always spoke of insolvency as a state existing independently of the insolvent act, and it was contemplated, as far back as the 17 July 1861, that there should be rules for a commercial insolvency. I have a M. S. note of it. See in support of this, art. 1038 C. C. Again, if we turn to art. 1037, it will be seen that the rules of the insolvent act only

gave "further presumptions;" that act disappearing, the code remained. The whole case therefore turns on articles 1543 and 1998.

The first lays down the general principle, the second limits it to 15 days from the sale. What does that mean? I am of opinion that the delivery here and the sale were co-eval, that the re-delivery took place within the fifteen days of the sale, and the transaction is therefore within the terms of art. 1998 C. C., and for this reason the judgment of the Court below should be confirmed.

Le jugement de la Cour d'Appel est dans les termes suivants :

" Considérant qu'il appert par la preuve en cette cause que dans le cours de juin 1882 les défendeurs Chaput et Massé ont donné un ordre aux intimés par l'entremise du commis de ces derniers pour des effets et marchandises dont ils avaient besoin pour leur commerce d'automne et d'hiver, et qui devaient leur être fournis et livrés plus tard ;

" Considérant que cet ordre n'a été exécuté que vers le 1er août 1882 par l'envoi à cette date des dits effets et marchandises ;

" Et considérant que jusqu'à cette dernière date il n'y avait eu qu'une promesse de vente d'une part et une promesse d'acheter de l'autre, et que la vente n'a été complétée que lorsque les marchandises ordonnées ont été acceptées par les dits Chaput et Massé par la remise qui leur a été faite le dit jour, 1er août 1882 ;

" Et considérant que le 14 août 1882 les dits Chaput et Massé, qui avaient cessé leurs paiements et étaient en faillite aux termes de l'article 17, paragraphe 23, du Code Civil, ont remis aux intimés, qui connaissaient la faillite des dits Chaput et Massé, les effets et marchandises qui leur avaient été vendues et livrées par les intimés le 1er août précédent, lesquels effets et marchandises étaient encore dans le même état que lorsqu'ils les avaient reçus ;

" Et considérant que cette remise a été faite par les dits Chaput et Massé pour demeurer quitte du prix des dits

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effets et marchandises qui était encore dû en entier aux intimés ;

" Et considérant qu'à l'époque où cette remise a été faite les intimés étaient encore dans le délai de quinze jours depuis la vente fixée par l'article 1998 du Code Civil, et dans les conditions requises par les articles 1999 et 2000 du Code Civil, pour exercer sur les dits effets et marchandises le privilége de vendeurs non payés ;

" Et considérant qu'il n'a été ni allégué ni prouvé que lorsque ces effets et marchandises ont été remis aux intimés ils valaient plus que le prix auquel ils avaient été vendus, et que cette remise n'a pas été faite avec l'intention de la part des dits Chaput et Massé de frauder leurs autres créanciers, mais bien de prévenir les frais qu'aurait occasionné l'exercice du privilége que les intimés avaient sur ces effets et marchandises pour être payé du prix qui leur en était encore dû ;

" Et considérant que les appelants, comme créanciers des dits Chaput et Massé n'ont pas établi qu'ils aient souffert aucun préjudice de la remise qui a été faite des dits effets et marchandises aux intimés ;

" Et considérant qu'il n'y a pas erreur, etc., cette Cour, pour les raisons ci-dessus confirme, etc."

Jugement confirmé.

Mercier, Beausoleil & Martineau, pour les appelants.

Abbott, Tait & Abbotts, pour les intimés.

(E. L.)

21 mars 1885.

Coram SIR A. A. DORION, J. C., RAMSAY, TESSIER, CROSS et BABY, JJ.

LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LÁ PAROISSE DE STE-ANNE DE VARENNES,

(*Demandeurs en Cour inférieure,*)

APPELANTS,

ET

PHILIAS CHOQUET,

(*Défendeur en Cour inférieure,*)

INTIMÉ.

Fabrique—Autorisation à poursuivre—Appel—Procédure.

JUGÉ:—(Sir A. A. Dorion, J. C., et Cross, J., différant)—

1o. Que le bureau ordinaire d'une fabrique peut autoriser des poursuites pour le recouvrement des revenus ordinaires de la fabrique et pour l'obtention d'un titre nouvel.

2o. Que cette autorisation n'a pas besoin d'être spéciale; mais qu'une autorisation générale de prendre des procédés légaux contre ceux qui sont endettés envers la fabrique, sans spécifier le nom de chaque débiteur, est suffisante.

3o. Que le défaut d'autorisation pour appeler dans une action de ce genre ne peut pas être invoqué pour la première fois à l'audition de la cause en appel, quand il n'a pas été invoqué dans le cours de la procédure et que les procureurs de l'appelant n'ont pas été mis en demeure de produire leur autorisation. (*Semble*, 1o. que l'appel en telles matières devrait être autorisé d'une manière tout aussi formelle que l'action en première instance; 2o. que le bureau ordinaire de la fabrique pourrait donner l'autorisation requise pour cet appel).

Appel d'un jugement de la Cour de Révision infirmant un jugement de la Cour Supérieure à Montréal, qui avait maintenu l'action des appelants.

SIR A. A. DORION, J. C. (*diss.*):—

Les appelants poursuivent l'intimé comme tiers-détenteur d'un immeuble affecté en leur faveur d'une rente constituée annuelle de $3 par année.

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Par un amendement à leur déclaration, permis par un jugement interlocutoire, les appelants allèguent qu'ils ont requis l'intimé de leur fournir un titre nouvel de la dite rente constituée; ce que l'intimé aurait refusé de faire; que par ce refus l'intimé a mis en danger les garanties des appelants, et en conséquence ils demandent à ce que le capital de la dite rente soit déclaré exigible en même temps qu'une année d'arrérages échue à l'époque de cette action. Les conclusions sont celles d'une action hypothécaire.

L'intimé a opposé à cette action une fin de non-recevoir, une défense en droit à partie des conclusions et une défense au fond.

1o. Par la fin de non recevoir l'intimé se plaint du manque d'autorisation des appelants à porter la présente action, parce que cette action excède les actes de simple administration et que les marguilliers ont pour une poursuite de ce genre besoin de l'autorisation des paroissiens ; et parce que, même si l'autorisation des marguilliers suffisait, celle produite par les appelants ne s'étend pas jusqu'à permettre la présente poursuite.

2o. Par la défense en droit l'intimé demande le renvoi de cette partie des conclusions qui demande le paiement du capital de la rente, et à défaut par lui de ce faire, le délaissement de l'immeuble.

3o. Par sa défense au fond l'intimé allègue qu'à l'époque où l'action lui a été signifiée il n'était plus le propriétaire de l'immeuble en question, l'ayant vendu à un tiers quelques jours auparavant. A cette dernière défense les appelants répondent que l'acte de vente n'ayant été enregistré que quatre jours après la signification de l'action, cette vente est sans effet à leur égard ; et que de fait l'intimé était encore en possession de l'immeuble quand l'action a été signifiée. Comme la réponse des appelants est bien fondée en fait, nous n'avons pas besoin de nous occuper plus longtemps du troisième plaidoyer de l'intimé.

La difficulté se présente à l'égard de la fin de non recevoir et de la défense en droit.

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Le jugement de la Cour de première instance déclare l'immeuble hypothéqué à la rente, et condamne l'intimé à délaisser, à moins qu'il ne préfère payer les arrérages dûs, c'est-à-dire $3.00, et consentir à passer un titre nouvel —ce qu'il sera tenu d'opter dans un délai de 15 jours, et ce délai passé, le défendeur est condamné purement et simplement au paiement de la rente et aux dépens.

L'autorisation produite par les appelants a été donnée dans une assemblée des marguilliers anciens et nouveaux tenue le 25 janvier 1880. A cette assemblée, F. X. Beauchemin, marguillier comptable, a été autorisé "de prendre " des procédés légaux contre ceux qui sont endettés envers " la dite œuvre et fabrique, de continuer les actions " actuellement intentées contre certains débiteurs et d'em- " ployer un avocat dans toutes causes où le ministère d'un " avocat sera requis."

A l'époque de cette résolution la somme de $3 réclamée par la présente action comme arrérages de constitut n'était pas encore due.

L'autorisation ci-dessus mentionnée a été jugée suffisante par la Cour Supérieure. La Cour de Révision a infirmé ce jugement pour le motif que les marguilliers ne pouvaient intenter le présent procès que sur une autorisation dans et par une assemblée duement convoquée de tous les fabriciens et paroissiens de la paroisse de Varennes.

Nous croyons tous que la Cour de Révision a fait erreur en énonçant ce principe, qui n'est pas conforme aux autorités sur cette matière. Mais sur la question de savoir si l'autorisation doit être spéciale je ne puis me ranger à l'opinion de la majorité de mes collègues. Le sujet est exposé d'une manière très claire par Rolland de Villargues (Répertoire, vo. Fabrique). D'après lui et les auteurs qu'il cite il me paraît établi que l'autorisation doit être spéciale et ne peut pas s'étendre à des procès différents ou ultérieurs, mais seulement à ceux qui sont mentionnés et compris dans l'autorisation. Cette restriction avait pour but d'empêcher les fabriques de se lancer dans des poursuites ruineuses ou inutiles. Il y a même une ordonnance qui défend formellement aux avocats de prendre des pro-

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cédés pour une fabrique sans être munis préalablement de l'autorisation requise. Et le défaut d'autorisation peut être invoqué sans avoir été plaidé. La présente action offre, d'ailleurs, l'exemple d'une poursuite tant soit peu extraordinaire, qui méritait certainement une autorisation spéciale. Car on exige du défendeur le capital d'une rente constituée parce qu'il a refusé de passer un titre nouvel. C'est la première fois de ma vie que je trouve une prétention pareille. Et le jugement de la Cour Supérieure condamne le défendeur à passer titre nouvel, ce qui est *ultra petita*, attendu que les conclusions de l'action demandaient, non pas que le défendeur fût condamné à passer titre nouvel, mais qu'il fût condamné à payer le capital de la rente pour avoir refusé de le faire. Si le demandeur désirait obtenir un titre nouvel il aurait dû le demander dans la forme habituelle indiquée par Pigeau, c'est-à-dire, conclure à ce que le défendeur fût condamné à passer titre nouvel, et qu'à défaut de ce faire, le jugement tînt lieu de titre nouvel.

Sans donc adopter tous les motifs du jugement de la Cour de Révision je suis d'opinion que le dispositif en est satisfaisant et devrait être confirmé, et que l'action des appelants devrait être renvoyée.

RAMSAY, J. :—

This case gives rise to a question of some importance as regards the regularity of legal proceedings by an ecclesiastical community.

Respondent on the 25th Jan. 1880 was charged with an annual rent in favour of the appellant of $3 a year constituted on a capital of 300 francs. At that time no arrears were due, but by an amendment to the declaration, appellants were permitted to demand of respondent a *titre nouvel* or payment of the capital in default of acquiescence in the demand to furnish a *titre nouvel*. To the action so amended respondent pleaded that the appellants had no authority to bring the action—1st. Because it was an action beyond acts of simple administration and required the authorisation of the parishioners—2nd. That if an authorisation by

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the *curé* and *marguilliers* is sufficient to entitle the *procureur* to institute an action of that sort, the alleged authorisation does not convey the authority required.

With regard to the first reason it seems to be decided by art. 24 of the Arrêt de St. Jean en Grêve that the *bureau ordinaire* may institute proceedings *pour faire passer des titres nouveaux*. Guyot, Répertoire, vo. Fabrique. A similar disposition is to be found in the Règlement du 25 mai 1745, pour la fabrique de Montfermeil, art. IX. Ancien Dénisart, vo. Marguilliers. And in his work "Code des Curés," Mr. Justice Beaudry says: "*Au bureau ordinaire de la fabrique* appartient le droit * * * * * *: 3o. D'autoriser les poursuites pour le recouvrement des revenus ordinaires de la fabrique, l'exécution des baux et l'obtention de titre nouvel," p. 221. This seems to embrace the principal ground of the present action.

As to the second point, the authorisation on which the action was brought is in these words—one Beauchemin, marguillier comptable, is authorized "de prendre des procédés légaux contre ceux qui sont endettés envers la dite œuvre et fabrique, de continuer les actions actuellement intentées contre certains débiteurs et d'employer un avocat dans toutes causes où le ministère d'un avocat sera requis."

Is this an authorisation to sue respondent for *titre nouvel?* Two objections are made—1. that the party to be sued is not named; 2. that this is not a debt.

I have been unable to find any authority among the old writers which goes to show that an administrative order of this sort authorising the *procureur* of the fabrique to sue all debtors is insufficient, or that it is necessary to detail the name of the debtor and the amount he owes. It will scarcely be maintained that this authorization would not bind the *fabrique*.

A debt is what is due, even damages for a *délit*, not only a definite sum of money that is due. This has never been questioned. Dig. de Verb. signif. l. 108, de reg. jur. 66. Pothier, Obl. 130. It is so used in the C. N., see specially

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articles 1188-9, 1190-1. It is also used in this sense in our code in art. 1093, and in many others. I think, therefore, that the action is within the terms of the authorization.

Two questions remain, could the appeal be instituted without a renewal of the authorization, and would an authorization to appeal be sufficient by the ordinary administrators? With regard to the latter question, I see no special limitation to the authority of the *bureau ordinaire*, to sue for a *titre nouvel*, and having authority to sue, it can certainly take all the proceedings the law allows, and appeal is one of them.

The other question is more difficult. Appeal is a new *instance*, and requires a new authorization. I don't think the new authorization can be less formal than the original one. But can the question be taken up by the court, without being raised in any way?

I think not, and I am therefore to reverse. This is the opinion of the majority of the court.

No question was raised on this appeal as to the form of the conclusions of the action, and my attention is drawn to it now for the first time. There can be no doubt that the conclusion of an action for a *titre nouvel* is that the defendant should either take out the new title or that the judgment should stand for it, and not that he should be evinced. But it is to be remarked that the judgment appealed from does not grant that faulty conclusion of the action.

Voici le jugement formel de la Cour d'Appel:—

"La Cour.....

"Considérant que le bureau ordinaire de la fabrique peut autoriser des poursuites pour le recouvrement des revenus ordinaires de la fabrique et pour l'obtention de titre nouvel;

"Considérant qu'il n'est pas nécessaire que l'autorisation soit spéciale, mais qu'une autorisation générale de prendre des procédés légaux contre ceux qui sont endettés envers l'œuvre et fabrique, sans spécifier le nom de chaque débiteur, est suffisante;

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"Considérant que le défaut d'autorisation pour appeler du jugement de la Cour de première instance n'a pas été invoqué au cours de la procédure, et partant que les procureurs des appelants n'ont pas été mis en demeure de produire leur autorisation ;

"Considérant que dans le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure siégeant en révision à Montréal, le 9 juillet 1883, il y a erreur, renverse le dit jugement, et procédant à rendre le jugement que la dite Cour Supérieure siégeant en révision aurait dû rendre, confirme quant à son dispositif le jugement rendu en cette cause par la Cour Supérieure siégeant en première instance à Montréal, le 16 juin 1883, avec dépens, etc."

Jugement de la Cour de Révision infirmé.

Mousseau, Archambault & Lafontaine, pour les appelants.

Geoffrion, Rinfret & Dorion, pour l'intimé.

(E. L.)

May 21, 1885.

Coram MONK, RAMSAY, TESSIER, CROSS and BABY, JJ.

G. C. ARLESS
(*Respondent in Court below*),
APPELLANT;

AND

THE BELMONT MANUFACTURING CO.
(*Plaintiffs in Court below*),

AND

SAMUEL C. FATT, ES-QUAL.
(*Plaintiff par reprise d'instance*),
RESPONDENT.

Joint Stock Company—31 *Vict.* (Q). *c.* 25—*Subscriber before incorporation—Agreement to take Stock—Non-liability.*

The appellant signed an undertaking to take stock in a company to be incorporated by Letters Patent under Q. 31 Vict. c. 25, but was not a petitioner for the Letters Patent, nor was his name included in the list of intending shareholders in the schedule sent to the Provincial Secretary with the petition. The appellant's name was not mentioned in the Letters Patent incorporating the company, nor did he become a shareholder at any time after its incorporation.

HELD:—(reversing the judgment of the S.C., Cross, J. dissenting)—

1st. That the appellant never became a shareholder of the company, and could not be held for calls on stock.

2nd. *The Union Navigation Co. & Couillard* (1) and *Rascony & the same Co.* (2) followed and approved. *McDougall et al. & the same Co.* (3) distinguished.

3rd. (Per TESSIER, J.)—That a subscription to stock in a company to be incorporated is a mere proposition and not a binding promise to take and pay.

4th. (Per RAMSAY, J.)—That under the terms of the Statute 31 Vict., Q. cap. 25, the only persons who are shareholders in a company incorporated thereunder are those named in the Letters-Patent as such, and those who become members after incorporation.

(1) 7 R. L. 215 and 21 L. C. J. 71. (2) 1 L. N. 494 and 24 L. C. J. 133.
(3) 21 L. C. J. 63.

Appeal from a judgment rendered by the Superior Court at Montreal, (TORRANCE, J.) on 30th January, 1884.

CROSS, J. (*diss.*) :—

The Belmont Manufacturing Co., an association organized under the Joint Stock Companies' Act (Q. 31 Vict. cap. 25), bring an action against Arless as a subscriber for one share in the stock of that company for the recovery of calls made on the stock.

The company was put in liquidation after the institution of the action, and the *instance* for the company was taken up by Fatt, the assignee, now respondent, upon which Arless pleaded to the effect that he never subscribed for any share in the capital stock and never became a shareholder in the company; that he had subscribed for stock in a company to be formed long previous to the date of the charter of the company in question and never took part in its proceedings. By a second plea he alleged that misrepresentation and fraud had been practised to obtain his signature.

The respondent produced a certificate in conformity to section 19 of the Statute of Quebec, 31 Vict., cap. 24, to establish the fact of Arless being a holder of one share of the stock of the company, on which the calls had been regularly made, and that the amount sued for was due and unpaid on said calls.

The company had been originally incorporated under the name of The Lawlor Manufacturing Co., but had been changed to The Belmont Manufacturing Co., by the Statute of Quebec, 45 Vict. cap. 75, sanctioned 1st May, 1882.

Arless produced a list of shareholders of the Lawlor Manufacturing Co., dated 30th November, 1883, certified by the Assistant Provincial Secretary, purporting to have been deposited in the Provincial Secretary's office, together with a notice of the application of that company for incorporation, in neither of which documents was Arless mentioned as a shareholder.

Arless in his examination as a witness admits that he

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subscribed for one share in the Lawlor Manufacturing Co., and that he had been notified to pay calls thereon.

The document which he subscribed is proved, and runs as follows:—"Subscriptions for the capital stock of the "Lawlor Manufacturing Company. Capital, one hundred "thousand dollars ($100,000). Montreal, Canada. The "undersigned hereby agree to take and they hereby do "take and subscribe to the number of shares in said Com- "pany set opposite to their respective signatures, or any "portion thereof, as may be allotted by the Board of "Directors, the whole subject to the conditions contained "in the Act incorporating said Company."

The Superior Court (1) condemned Arless to pay the calls on the stock for which he had so subscribed, and for which he had been sued. He now appeals from that judgment, relying chiefly on the precedents of *Rascony & The Union Navigation Co.*(2), and *The Union Navigation Co. & Coullard.*(3)

He contends that there was no acceptance of his subscription, nor any allotment to him of a share. I should hold that the call upon him to pay before anything was done by him to withdraw his subscription was, in all respects, equivalent to closing the transaction and making a complete bargain between him and the company. Allotment of shares is a formality seldom or never resorted to here. Shares applied for or subscribed rarely exceed the capital sought to be raised, and in place of the customary form practised in England of the intending shareholder sending an application to have shares allotted to him, the practice is for the promoters of the company to solicit subscriptions to the stock, and for the subscribers to sign an undertaking to take shares. A similar practice prevails in the United States, and there such an undertaking is held binding in favour of the company when they become incorporated and call for its fulfilment. See *Angell & Ames* on Corporations, §§ 523 and 524; also Abbott's Digest of Corporation Cases, Vo. "Subscription," p. 801, § VI., Nos. 152–159. This is quite reasonable; the promise to take shares and be a subscriber

(1) 7 L. N. 50. (2) 24 L. C. J. 133. (3) 21 L. C. J. 71.

is binding if it remains unrevoked and not withdrawn until the company becomes incorporated and accepts the promise by giving its assent thereto, as it effectually does by making the calls and notifying the parties who have subscribed for shares. By our Provincial Statutes there must be a certain proportion of shareholders bound before the company can become incorporated. Subscribers can certainly bind themselves to the company after it has become incorporated. There is no good reason why they should not do so when the application for incorporation is in progress, yet in such case the names would neither appear in the charter nor in the application. It cannot then be the mere fact of the names of prior subscribers being handed in to the Secretary's office which makes them liable. It is their promise which makes them liable and which becomes absolutely binding on both parties as soon as it is accepted. It is said that their non-return to the Secretary implies an abandonment of their subscription by the promoters of the company. I think it can imply no more than a suspension of the acceptance of the promise, if even that acceptance is necessary, which perhaps is doubtful. It may be readily understood why in England a preliminary subscription may be held to be a mere proposal to take stock. Besides the formality of allotment practised there, other formalities are required, among which are signing articles of association.

I have examined the proof made in the cases of *Couillard* and *Rascony* against the Union Navigation Company (*sup. cit.*), and I find that although they were shown to have subscribed, neither was any signature proved nor any form of undertaking or writing produced or proved to which they had agreed. The cases were not identical with the present. I hold with the judge of the Superior Court that the question is simply whether a contract to take stock has been proved. I am of opinion it has been proved, and I would confirm the judgment.

TESSIER, J.:—

Le défendeur est-il tenu par la prétendue souscription

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d'une part de cent piastres précédemment à l'incorporation de cette compagnie ? Il prétend n'être pas tenu parce qu'il n'a pas été inclus parmi ceux qui ont demandé l'incorporation, ni parmi ceux qui sont nommés dans les lettres-patentes, ni même dans la liste des souscripteurs ou actionnaires transmise au gouvernement pour obtenir ces lettres-patentes. Ces prétentions s'accordent avec la preuve. Le défendeur Arless n'a participé à aucune assemblée ou agissement de la compagnie, qui a ensuite changé de nom en vertu d'un acte de la législature en 1882; il a toujours refusé de se reconnaître tenu comme actionnaire, et n'a jamais rien payé.

Cette souscription préliminaire ne doit être considérée que comme une simple proposition. *Abbott*, dans son ouvrage 'Digest of Corporations,' vo. 'Subscription' No. 155, pose le principe dans les termes suivants:—"Until "all the requirements of the statute have been complied "with and the articles of the association filed, the sub- "scription of any one person to the articles is a mere pro- "position to take the number of shares specified, of the "capital stock of the corporation thereafter to be formed, "which is revocable, and not a binding promise to take "and pay."

C'est d'après cette doctrine que cette Cour a décidé les causes de *La Cie. de Navigation Union & Couillard* (1), et *Rascony & la même Cie.* (2). Les faits de la présente cause sont analogues à ceux prouvés dans les deux causes suscitées.

L'intimé cite une cause de *Jones & The Montreal Cotton Co.* (3), mais la cause a été décidée sur un autre point. On peut consulter Stephens, Quebec Law Digest, vol. II, vo. 'Companies,' pp. 171-173, où toutes les causes portant sur cette question sont citées.

C'est d'après notre propre jurisprudence que la présente cause est décidée. Il y a une cause de *McDougall & The Union Navigation Co.* (4), où le défendeur a été condamné à payer parce qu'il y avait eu paiement de certains verse-

(1) 21 L. C. J. 71. (2) 24 L. C. J. 133. (3) 1 L. N. 450. (4) 21 L. C. J. 63.

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ments. Le contrat, dans ce cas, était complet, et le défendeur a été justement condamné. Mais au contraire dans l'espèce qui nous est soumise il n'y a pas de contrat par défaut d'acceptation de la compagnie, qui a même exclus le nom de Arless dans les lettres-patentes d'incorporation et dans la liste des actionnaires fournie au gouvernement. Aussitôt qu'Arless a été notifié de payer il a révoqué sa souscription, et a constamment refusé de se reconnaître souscripteur.

En conséquence cette Cour est d'opinion de maintenir cet appel et débouter l'action avec dépens.

RAMSAY, J. :—

The appellant subscribed for one share in a company to be formed, called the Lawlor Manufacturing Co. A company was subsequently formed under letters-patent to certain persons, petitioners, of whom the appellant was not one.

The company was incorporated by letters-patent in conformity with the Act, 31 Vict., c. 25. That Act authorises the Lieutenant-Governor to grant letters-patent to any number of persons less than five who shall petition, and others who may become shareholders. It is not contended that appellant became a shareholder after the letters-patent were granted. The only other way he could become a shareholder was by being a petitioner. It is not pretended that he was a petitioner; indeed the reverse seems to be proved, for his name does not appear in the schedule of promoters or shareholders furnished to the Provincial Secretary. The case of *Rascony* v. *The Union Navigation Co.*(1) seems in point. In the case of *McDougall* and the same company (2) this Court held that McDougall was estopped from urging that he was not a shareholder because he had acted as one of the company subsequently to the letters-patent. The case of *Jones* and *The Montreal Cotton Co.*(3) was also referred to, but the case is not in point. Several persons signed conditionally and they were included in the company. They refused to pay their

(1) 24 L. C. J., 133. (2) 21 L. C. J. 63. (3) 1 L. N. 450 and 24 L. C. J. 108.

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shares, and were absolved from paying their calls. Jones signed unconditionally, but says he told the secretary of the company that he signed on the same conditions as these other parties. This was held to be insufficient, for Jones having held himself out as a contributory unconditionally, he could not escape his liability by setting up a private conversation with the secretary at the time he subscribed.

I am of opinion that the judgment should be reversed and the action dismissed.

The formal judgment of the Court is in the following terms :—

"Considering that the respondent (plaintiff *par reprise d'instance* in the Court below) hath not proved the material allegations of the *demande* in this cause, and that the appellant (defendant below) hath established by evidence the principal averments of his pleas;

"Considering that although the appellant had agreed to take one share in the capital stock of the Lawlor Manufacturing Company at the beginning of its formation, he never, in fact, became a shareholder of the said Company, and was not considered so by the said Company at the time of its incorporation under the provisions of the Act, 31 Vict., chap. 25, as his name was not included in the notice of application for the obtaining of Letters-Patent, incorporating the said The Lawlor Manufacturing Company subsequently to its incorporation, nor that he ever subscribed for stock in the Belmont Manufacturing Company, to wit, the Company, Respondent, which has succeeded to the Lawlor Manufacturing Company;"

"Considering &c. . . . . that there is error, &c. . . . . doth reverse, &c. . . . . (The Hon. Mr. Justice Cross dissenting.)

Judgment reversed.

Girouard & McGibbon, for appellant.

Macmaster, Hutchinson & Weir, for respondent.

(E. L.)

27 mai 1885.

Coram SIR A. A. DORION, J. C., MONK, TESSIER, CROSS & BABY, JJ.

ALPHONSE METRAS

(*Demandeur en Cour Inférieure*),

APPELANT ;

ET

JOSEPH TRUDEAU ET AL.

(*Défendeurs en Cour Inférieure*),

INTIMÉS.

Jugement interlocutoire — Appel — Procédure — Chose jugée — Elections municipales — Commissaires d'Ecoles — Quo warranto — S. R. B. C., c. 15, *ss.* 39 *&* 40 — *C. P. C. art.* 1016—45 *Vic., c.* 29, *s.* 2 — *Code Municipal, art.* 346, *sqq.* — *Juridiction exclusive.*

JUGÉ :—1o. Que l'appel du jugement final de la Cour Supérieure soulève de nouveau tous les jugements interlocutoires rendus dans la cause, et que le défaut par un défendeur d'excipier ou d'appeler d'un jugement interlocutoire renvoyant son exception à la forme, ne l'empêche pas de discuter ce jugement sur l'appel du jugement final, l'interlocutoire n'étant pas *chose jugée* sur les questions soulevées par son exception à la forme.

2o. Que d'après les provisions de l'acte 45 Vict. c. 29, sec. 2, et les articles 346 sqq. du Code Municipal, les contestations d'élections de Commissaires d'Ecoles doivent être portées devant la Cour de Circuit ou la Cour de Magistrats, qui ont une juridiction exclusive en ces matières.

3o. Que partant le recours par bref de *quo waranto* établi par S. R. B. C. c. 15, sec. 40, contre l'usurpation de telles fonctions, est abrogé.

4o. Que même si ce recours existait encore concurremment avec celui indiqué par la loi nouvelle, la simple élection des défendeurs comme commissaires d'écoles, sans qu'ils se soient immiscés dans l'exercice de telle charge, ne donnerait pas lieu à l'émanation d'un *quo warranto*. (Art. 1016 C. P. C.)

Appel d'un jugement de la Cour Supérieure dans le district d'Iberville, rendu le 3 novembre 1884, par son Honneur le Juge Chagnon.

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BABY, J. :—

On se plaint ici, par voie de *quo warranto*, de l'élection de certaines personnes à la charge de Commissaires d'Ecoles pour la paroisse de St. Michel-Archange. Le jugement dont on appelle dit en somme : Aux termes de l'art. 1016 du Code de Procédure, toute personne intéressée peut porter plainte lorsqu'un individu usurpe, prend sans permission, tient ou exerce illégalement une charge publique ou une franchise dans le Bas-Canada, ou une charge dans une corporation, corps ou bureau public, et dans l'espèce le demandeur porte plainte parce que, d'après ses prétentions, les défendeurs occupent et exercent la charge et franchise de commissaires d'écoles pour la municipalité scolaire de la paroisse de St. Michel-Archange ; il est en preuve que les défendeurs ont bien été déclarés élus à la dite charge hors leur présence et participation dans une assemblée publique convoquée en conformité à la loi des écoles communes, le 7 juillet 1884, mais il n'appert pas, par la preuve, que les défendeurs aient occupé et exercé la dite charge, en aient pris possession, l'aient usurpée et détenue, et aient jamais agi ou prétendu agir comme tels commissaires d'écoles.

Considérant que l'information dans la nature d'un *quo warranto* ne peut s'adresser qu'à la personne qui usurpe, détient et exerce la charge dont il est question dans la plainte, et qu'elle lui commande de déclarer en vertu de quelle autorité il s'immisce dans l'exercice de la dite charge, et comme les défendeurs n'ont jamais usurpé, pris sans permission, détenu ou exercé la dite charge de commissaires d'écoles, la procédure adoptée par l'appelant doit être mise de côté, sauf à se pourvoir de nouveau lorsque les défendeurs se seront immiscés réellement dans l'exercice de la dite charge, agiront et prétendront agir comme tels commissaires.

Les défendeurs avaient tout d'abord produit une exception à la forme, mais elle fut renvoyée, duquel jugement il n'a pas été appelé dans le temps.

Aujourd'hui, ils prétendent qu'il leur est parfaitement

loisible de faire prévaloir devant cette Cour les raisons contenues en cette exception à la forme, droit que l'appelant leur nie, disant qu'il y a maintenant *chose jugée* entre eux sur ce point.

Nous sommes d'avis que tel n'est point le cas.

Les intimés alléguaient que le seul remède qui incombait à l'appelant était la Requête sommaire indiquée dans le chapitre septième du Code Municipal, laquelle contestation appartenait, aux termes de l'art. 348, à la Cour de Circuit du District ou du Comté ou à la Cour de Magistrats, à l'exclusion de toute autre Cour.

Voyons quelle est la loi sur le sujet. Par les Statuts Refondus du Bas-Canada. chap. 88, sect. 41, la procédure indiquée est toute autre que celle actuellement reconnue par la loi. Voir la section.

Mais subséquemment, par l'acte de Québec de 1882, ch. 29, sec. 2, cette clause fut abrogée dans les termes suivants :

" La section 41 du même acte—le Stat. Ref. B.-C., chap. " 15—est remplacée par la suivante :

" 41. Pour toutes les fins de la section précédente, la " procédure qui devra être faite, sera la même que celle " se rapportant à la contestation des élections municipales, " et les mêmes délais de procédure s'y appliqueront." Or, maintenant quelle est cette procédure indiquée pour la contestation des élections municipales? Elle se trouve tout naturellement dans le Code Municipal, et l'on voit aux articles 348 et 349 comment on doit procéder : c'est par requête à la Cour de Circuit du Comté ou District ou devant la Cour de Magistrat qui ont jurisdiction absolue et exclusive. (Voir ces articles).

Il est évident par ces deux articles que nul contestation de la nature de celle-ci ne saurait être portée ailleurs qu'en Cour de Circuit ou devant la Cour de Magistrat. Impossible de donner une autre interprétation, et c'est ce qui a déjà été décidé par nos tribunaux particulièrement en Cour de Révision siégeant à Québec dans la cause *Paris & Couture.*(1) Une toute autre procédure, plus sommaire

(1) 10 Q. L. R. 1.

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et moins couteuse est substituée à l'autre. Voici ce que disait l'Hon. Juge en Chef Meredith : " These words appear to me to be amply sufficient to give to the Circuit Court and Magistrates Courts mentioned in article 348 exclusive jurisdiction respecting the examination and decision of any contestation," &c., et plus loin : " Upon the whole, I " am of opinion that the articles 346 and 348 of our Muni- " cipal Code give exclusive jurisdiction to the Circuit " Court and Magistrate's Court respecting contestations, " &c., and therefore that the judgment of the Court be- " low, rejecting the proceedings by *quo warranto* in this " Court in the present case ought to be confirmed."

Cette Cour est de la même opinion. Tel que nous l'avons vu ci-haut, le jugement de la Cour inférieure dit : le *quo warranto* ne peut être dirigé que contre celui qui usurpe, tient, etc., une franchise, office, etc., aux termes de l'art. 1016, et les défendeurs n'étant pas dans cette position, telle procédure que celle adoptée par l'appelant ne peut se maintenir en pareil cas. Nous pensons aussi de même et croyons que dans tous les cas les intimés ont été légalement déchargés de répondre à l'appelant. Le jugement est donc confirmé avec dépens.

Jugement confirmé.

Robidoux & Fortin, pour l'Appelant.

Pagnuelo, Taillon & Gouin, pour les Intimés.

(E. L.)

March 24, 1885.

Coram DORION, C.J., RAMSAY, J., TESSIER, J., CROSS, J., BABY, J.

THE MONTREAL, PORTLAND AND BOSTON RAILWAY COMPANY

(*Respondent below*),

APPELLANT;

AND

JOHN CASSIE HATTON

(*Petitioner below*),

RESPONDENT.

Mandamus—Corporation—Fine—C. C. P. 1025.

HELD:—That the fine which a corporation may be condemned to pay under Article 1025 C. C. P., should be ordered to be paid one half to the Crown and one half to the petitioner.

The appeal was from a judgment of the Superior Court, Montreal, LORANGER, J., reported in M. L. R., 1 S. C. 69.

A number of objections were taken to the judgment, but the only point which it is necessary to notice, for the purpose of the present report, is the pretension that the fine which the appellants had been condemned to pay under C. C. P. 1025, 1027, should have been payable to the Crown.

O'Halloran, Q.C., for the appellant:—

In the case of a corporation it is submitted that the penalty is imposed, not as damages or compensation to the petitioner, but for disobedience to the order of the Court, and, like any other penalty for contempt of Court, should be adjudged as a forfeiture to the Crown.

Morris and *Geoffrion, Q.C.*, e contra.

The Court in rendering judgment overruled all the objections urged by the appellant, but ordered that the fine should be paid one half to the Crown and one half to the

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present respondent. A clerical error in the reference to a Statute was also amended. The judgment is as follows:—

"Considérant qu'il n'y a pas mal jugé dans le jugement dont est appel, savoir: le jugement rendu par la Cour Supérieure siégeant à Montréal le 5e jour de septembre 1884, sauf et excepté dans celui des considérants du dit jugement dans lequel il est énoncé que l'acte spécial de la Compagnie défenderesse (Québec 35 Vict., ch. 39, sections 7 et 8) tel que subséquemment amendé par la 39 Vict., ch. 3, détermine le nombre des directeurs de la dite Compagnie, le lieu et le mode de leur élection et le jour où doit être convoqué l'assemblée annuelle des actionnaires pour les fins de leur élection; la dite énonciation étant erronée attendu que l'acte par lequel le dite acte spécial de la dite Compagnie est ainsi amendé est l'acte de Québec 37 Vict. ch. 24, et non l'acte 39 Vict. ch. 3; et aussi dans le considérant suivant où après la citation de l'acte 35 Vict. ch. 29, les mots et 'le dit acte l'amendant' auraient dû être ajoutés; ainsi que dans le dispositif du dit jugement qui condamne la dite Compagnie purement et simplement, sur son défaut de convoquer dans le délai d'un mois, une assemblée générale des actionnaires pour élire les directeurs, à payer au requérant, l'intimé actuel par voie d'amende, une somme de $2,000, tandis que par la loi la dite amende devait être repartie par moitié entre le requérant et Sa Majesté, ses héritiers ou successeurs;

"Il est en conséquence ordonné que la citation erronée de l'acte 39 Vict. ch. 3, comme étant l'acte amendant le dit acte spécial de la Compagnie, soit rayée du dit considérant en premier lieu mentionné et remplacé par la citation du Statut de Québec 37 Vict. ch. 24; que le considérant en second lieu mentionné soit amendé par l'insertion après les mots '35 Vict. ch. 29' des mots 'et du dit acte l'amendant'; et quant à l'erreur ci-dessus mentionnée dans le dispositif du dit jugement, il est ordonné que le dit dispositif soit amendé par la suppression des mots 'au requérant', et par l'insertion après les mots 'par voie d'amende une somme de $2,000' des mots suivants: 'moitié

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au requérant et l'autre moitié à Sa Majesté, ses héritiers ou successeurs';

"Et la Cour confirme le dit jugement à tous autres égards sauf quant aux parties d'icelui présentement amendées avec dépens en faveur de l'intimé contre la dite appelante;

"Et ordonne que le délai pour la convocation de l'assemblée, où il sera procédé à l'élection des directeurs en la manière et avec les formalités prescrites par le dit jugement, soit étendu au délai d'un mois à compter de la signification du présent jugement."

Judgment modified.

M. S. Lonergan, attorney for Appellant.

John L. Morris, attorney for Respondent.

(J. K.)

May 26, 1885.

Coram DORION, C.J., MONK, J., TESSIER, J., CROSS, J., BABY, J.

JOSEPH A. ROY,

(*Plaintiff below*)

APPELLANT;

AND

LA COMPAGNIE DU GRAND TRONC DE CHEMIN DE FER DU CANADA,

(*Defendant below*)

RESPONDENT.

Company—Railway—Negligence.

HELD:—That no presumption of fault arises against a railway company from a person being injured on the track; on the contrary, it is for the person injured to show that he had a lawful right to be there; and to enable him to claim damages he must also show that the company were guilty of some fault, neglect or imprudence whereby

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the injury was caused. So, where the plaintiff was injured by a train at a street crossing, and it appeared that there was a signboard indicating the crossing, and that the bell was rung and the whistle sounded to warn passers of the approaching train, it was held that the plaintiff could not claim damages from the company.

The appeal was from a judgment of the Superior Court, Montreal, MACKAY, J., dismissing an action of damages brought by the present appellant against the Grand Trunk Company, the reasons assigned in the judgment being as follows:—

"Considering that there is absence of proofs to certify of fault committed by defendants or their servants, leading to the accident by which plaintiff says he was hurt, and for which hurt he claims damages;

"Considering that defendants have proved that they and their servants were not in any negligence;

"Considering that the accident would not have happened had plaintiff used reasonable care in approaching the railroad track, he well aware of the locality and of what risk he ran in approaching without care."

P. H. Roy for the appellant.

G. Macrae, Q.C., for the respondent.

CROSS, J.:—

This appeal is from a judgment dismissing an action of damages brought by Dr. Roy, a physician practising in the city of Montreal, against the Grand Trunk Railway Company.

He complains that having occasion to visit patients near the town of St. Henry, in the vicinity of the city of Montreal, he made an attempt to cross the railway by St. Philip street, St. Henry, in the direction of the river St. Lawrence, about half-past five o'clock in the evening of the 23rd November, 1880, when he was overtaken by a locomotive belonging to the Company, proceeding with great rapidity from the city of Montreal, which overturned and injured his sleigh and inflicted on himself serious personal injury, for which he claimed the sum of $10,000. He alleges that the St. Philip street crossing is an extremely dangerous one; that on one side houses are

built up to near the railway, so as to obstruct the view of approaching trains; that the evening in question was very dark; there were no signboards there indicating the crossing, as required by law; the locomotive by which he was injured carried no head-light, rang no bell and sounded no whistle, so that it was wholly the fault of the Company and the servants that the accident occurred and he sustained the injury.

The Company pleaded that they had been guilty of no fault or neglect by themselves or their servants, and if Dr. Roy sustained any injury it must have through his own fault, neglect or imprudence.

The collision was proved, and injury sustained by Dr. Roy of a character sufficiently serious to keep him confined to his house for some time to the prejudice and loss of his professional income and some expense to himself.

The question comes to be, whether he is entitled to indemnity from the railway. The question is one purely of fact as to who, if any one, was in fault.

There is no doubt of the crossing being an extremely dangerous one where extra precautions are desirable; but the duties imposed upon the railway are regulated by the statutes, their right to exercise their privileges are subject to the conditions thereby imposed. If they fulfil these conditions, they are considered to have exercised diligence and are not in fault. The controversy is consequently reduced to an enquiry as to the facts. The proof shows that the signboard indicating the crossing existed at the point in question at the time of the accident, in accordance with the requirements of the law. It is contended for the Doctor that there should be two signboards—one on each side of the railroad; but this has not been the practice nor the way the law has been construed. The locomotive, which must have been the one in collision with Dr. Roy, undoubtedly had a head-light. The only question in respect to which a doubt has been raised as regards the proof, was as to the ringing of the locomotive bell. It is proved in a very positive manner, not only by the persons in charge but by others, that there

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were but three engines went out that evening between five and six o'clock; the bells were rung and the whistles sounded. One of the witnesses' habit is to report if the bell is not rung, and another was on the track—not on an engine or train. For the appellant but one witness—Dr. Roy's brother, who was in the sleigh with him—swears the bell was not rung. Adelard Leonard, a schoolboy of twelve years, says he did not hear it, but he was at some distance. The fact of its being rung on all the three trains that passed out that evening is corroborated by quite a number of witnesses, and an explanation given of the precautions adopted to secure it. It is besides shown that the engine could not have been going fast on account of the stoppages it had to make, and that at St. Philip street an approaching train can be seen at a reasonable distance. We find that the Company had adopted all the precautions they were bound to take, and for that reason must hold them excused and must confirm the judgment which dismissed Dr. Roy's action.

It is no doubt a hard case for him, but all are subject to accidents. No presumption of fault arises against a railroad from a person getting injured on the track; on the contrary, it is for him to show that he had a lawful right to be there; and to enable him to claim damages from the railroad he must besides show that they were guilty of some fault, neglect or imprudence whereby the injury was caused. It has not been so shown in this case, and, as a consequence, we confirm the judgment of the Superior Court. The case of *Lovett* v. *Grand Trunk Railway Company* (1) is in point.

MONK, J.:—

There is some contradiction in the evidence, but it appears that the engine was moving at a moderate speed, and that the company had complied with all the requirements of the law. It is quite true that it was a dangerous crossing, but Dr. Roy was in the habit of passing the place and was fully aware of the danger. The engine

(1) 3 Legal News, 98.

was in sight when he attempted to cross. We do not think that in a case of this nature there is any ground for disturbing the decision of the Court below.

Judgment confirmed.

Roy & Boutillier, attorneys for appellant.

Geo. Macrae, Q.C., attorney for respondent.

(J. K.)

May 27, 1885.

Coram MONK, J., RAMSAY, J., TESSIER, J., CROSS, J., BABY, J.

CLÉMENT DANSEREAU ES QUAL.

(*Plaintiff in Court below*),

APPELLANT;

AND

CHARLES H. LETOURNEUX

(*Defendant in Court below*),

RESPONDENT.

Insolvent Act of 1875—*Official Assignee continued as Creditors' Assignee—Suretyship.*

HELD:—Where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have appointed him assignee to the estate without exacting any further security, and while acting as assignee of the creditors he makes default to account for monies of the estate, that the creditors have recourse upon the bond given for the due performance of his duties as official assignee.

The appeal was from a judgment of the Superior Court, Montreal, JETTÉ, J., dismissing the appellant's action. The decision is reported in 5 Legal News, 339.

Béique, Q. C., for the appellant.

Lacoste, Q. C., for the respondent.

CROSS, J.:—

In 1875 Olivier Lecours was appointed an Official Assignee under the provisions of the Insolvent Act of 1875, 38 Vic., cap. 16, and on the 26th of August of that

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year the respondent and Joseph Brunet entered into a bond to Her Majesty, in conformity with section 28 of said Act, to stand as a security for the benefit of the creditors of any estate which might come into his possession under said Act.

On the 26th of February, 1876, Lecours, in his quality of Official Assignee, received and accepted an assignment of their estates from Messrs. Pierre Houle and Remi Favreau, partners in business under the firm of Houle & Co., and in consequence came into possession of divers parcels of real estate pertaining to the insolvents.

On the 22nd March, 1876, Lecours was named assignee by the creditors. He caused the real estate to be sold in due course of law to Augustin Robert, to whom he executed a deed of conveyance on the 11th July, 1876, therein acknowledging that he had received the price—$8,355.

At the instance of Rieutord, a creditor, he was by the Court on the 29th March, 1879, ordered to deposit this amount in a bank under pain of imprisonment, which he failed to do and absconded.

On the 10th April, 1879, the appellant was named assignee to Houle & Co., to replace Lecours, and the creditors refusing to prosecute the securities of Lecours, Rieutord, as creditor, on the 16th September, 1879, obtained leave of the Court to prosecute the present action in the name of the assignee, and has accordingly instituted the same, claiming for the creditors $6,000, the amount of said security bond, from the respondent as one of the sureties.

The respondent defends on the ground that when said properties were sold Lecours was acting not as Official Assignee but as simple assignee, named by the creditors, and that the security bond in question did not cover or extend to these acts.

A question of law was thus raised as to whether the creditors, who had named the same assignee to whom the assignment had been made, could claim the benefit of the security given by him for his conduct, generally, as an Official Assignee under section 28 of the Insolvent Act.

This question was already before this Court in the case of *The Canada Guarantee Company & McNichols* (1), and was decided in favor of the validity of the security. It is an extremely nice point—one which has resulted in contradictory decisions both in Upper Canada and here.

We held that the restrictive principle to the effect that sureties were only bound within the strict letter of the law, and that suretyship could not be extended *de persona ad personam, de tempore ad tempus, de re ad rem*, had not a just application in this case to relieve the sureties in question. They were in the first instance required to be given for the benefit of all concerned, that is, for the benefit of the creditors of any estate that might come into the assignee's possession. Had the creditors taken no action, the security in question would undoubtedly have remained good for their benefit generally. Having resolved to retain the same assignee, they adopted him with the sureties existing to guarantee his conduct; they relinquished nothing, but simply approved of the same person remaining assignee. He had no account to render and no delivery over to make to a successor, who would have accepted the property and account and given him a discharge. He remained accountable, and his sureties remained bound for that account. To be more certain that this is the proper construction of the law, we should read together the different portions of the Insolvent Act of 1875 bearing on the point, beginning with section 28. Abstracting the words applicable to the point, it would read as follows:—"Each person so appointed assignee shall hold "office during pleasure, and before acting as such shall "give security for the due fulfilment and discharge of his "duties for the benefit of the creditors of any estate which "may come into his possession under this Act; and in case "any such assignee fails to pay over the monies received "by him or to account for the estate or any part thereof, "the amount for which such assignee may be in default "may be recovered from his sureties," &c. The security is to cover any estate that may come into the assignee's

(1) 6 Legal News, 323.

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hands, and his sureties are to be liable in case he fails to pay over the monies received by him or to account for the estate. There is no qualification limiting it in this respect to his official capacity, nor to any person save the creditors, who is to give him a discharge. He receives the whole estate by the assignment, and must be responsible for it until he gets a legal discharge. His adoption by the creditors as the assignee who is to retain the estate without asking additional security, is his acceptance by them with such security as he brings with him. This would seem to be the intention of the law, because, by sub-section *a* of the same section, it is provided that "the Official Assignee may be required to give such further "security as on petition of a creditor the Court or Judge "may order." By section 29 the assignee, on his appointment by the creditors is to "give security in manner, form "and effect as provided in the preceding section," that is for any estate which may come into his possession. And by sub-section *b* of section 29, "Any creditor of the "estate may, in the case of any person required under "the said 28th and 29th sections to give security, have "inspection of such security, and may, if in his opinion "the surety or sureties in such security are insufficient, "apply on notice to the Judge for an order that new or "additional sureties be furnished." It is, I think, a fair construction to hold that these securities may co-exist; if so, there is the greater reason that the one first given is not discharged by the mere adoption by the creditors of the Official Assignee who accepted the assignment. Up to the time of his realizing and distributing the proceeds of the estate, there is no person having the quality or capacity of receiving from him the value in his hands and granting him a discharge. This is a beneficial construction, and one dictated by common sense. I should, therefore, hold the respondent responsible on his bond to the extent of the appellant's claim.

It is a question whether the whole amount of the bond should not be recovered for the benefit of those interested,

but no other creditor claims, and we will not suppose an intention to do so.

I would reverse the judgment and give judgment for appellant to the extent of his interest.

Clark, in his "Treatise on the Insolvent Act," at p. 136, remarks :—"It will be observed that the 28th section "requires an Official Assignee, on being appointed by the "Governor-in-Council and before acting, to give security "for the benefit of the creditors generally. He is also, "under section 28, on assuming the management of any "estate, liable to give such further security as on the peti- "tion of a creditor of that estate the Judge may order. "Under this section the assignee appointed at the first "meeting of the creditors must give security to such an "amount as may be fixed by the creditors at the meeting.

"It would seem that if the creditors' assignee is also an "assignee appointed by the Governor-in-Council, and has "already given security under section 28, he is not bound "to give fresh security under this section, though he may "be called upon to increase it. But if he has not given "security when chosen assignee by the creditors, this sec- "tion compels him to do so to such an amount as the "creditors may then fix.

"It seems intended chiefly to meet the case of the cre- "ditors' assignee not being an Official Assignee, and not "having already given security to the Crown," in support of which he cites *Church* v. *Cousins*, 28 Q. B. U. c. 540.

Sec. *a*, under this section, directs the deposit of the securities given or to be given under sections 28 and 29 for the use of persons entitled to sue thereon, and by section *b* any creditor may have inspection of the securities given under sections 28 and 29, and may, if in his opinion the surety or sureties are insufficient, apply for an order that new or additional sureties be furnished. This section evidently contemplated the co-existence of both previous kinds of security, that is under sections 28 and 29, and that an addition may even be made, so that there may be three co-existing securities for the benefit of the

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creditors. I am aware that there have been contradictory decisions on the question involved, but we adhere to the precedent already made by this Court. We hold the security given by the assignee to the Crown, in this case, on his appointment as assignee, available to the creditors for the assignee's deficiency. We therefore reverse the judgment of the Superior Court and give the appellant judgment for the amount to which the creditor is interested, for whose benefit the present suit has been instituted. That amount we conceive it our duty to limit to the actual cost to the claimant of the credit now sought to be enforced, being disposed to view it in the nature of the purchase of a *droit litigeux*.

RAMSAY, J.:—

The principal question that comes up in this case is the one decided in *The Canada Guarantee Company & McNichols* (1). In that case the Chief Justice and I dissented, and the judgment of the Court in this case seems to have followed the dissent. Although my opinion is unchanged, I think it right in a matter of this kind, where the interpretation of a statute only is involved, to adopt the jurisprudence established, leaving to a higher tribunal or to the Legislature the responsibility of setting the Court right if it is in error.

The judgment of the Court below does not determine any of the other pleas filed, and with the second, third and fourth pleas I am against the respondent. I concur with the other members of the Court in the view taken of the fifth and sixth pleas.

The judgment is recorded as follows:—

"Considérant qu'en sa qualité de syndic officiel le dit Lecours était tenu et obligé sous sa responsabilité personelle ainsi que l'intimé—qui a garanti par son cautionnement l'exécution fidèle par le dit Lecours des devoirs de sa charge—de payer aux créanciers des faillis Houle & Cie. le produit des biens des dits faillis, et que cette responsabilité—aussi bien celle du dit Lecours que celle de

(1) 6 Leg. News, 324.

sa caution—est restée la même après la nomination du dit Lecours comme syndic par les créanciers, et que ni l'un ni l'autre n'en ont jamais été déchargés, ni relevés;

"Considérant que le dit Lecours est resté en possession des biens de la faillite Houle & Cie., et a manqué à son obligation d'en rendre compte et d'en payer le produit aux créanciers d'icelle, et s'est trouvé à découvert pour un montant considérable excédant celui du cautionnement, et l'était encore lorsque la présente action a été intentée;

"Considérant que le cautionnement donné par l'intimé couvre le deficit du dit Lecours, et que l'intimé en est responsable vis-à-vis de l'appelant en particulier jusqu'à concurrence du montant qui est legitimement dû au nommé Felix Rieutord qu'il représente en sa dite qualité;

"Mais considérant que la créance du Félix Rieutord, représenté en cette cause par l'appelant en sa qualité officielle, est litigieuse de sa nature, et qu'il n'a réellement payé et déboursé qu'une somme de mille paistres pour en devenir l'acquéreur, et que quant au dit Félix Rieutord le cautionnement est réductible à la mesure du montant par lui actuellement payé;

"Considérant que dans le jugement dont est appel, savoir le jugement rendu le 30e jour de septembre 1881 par la Cour Supérieure siégeant à Montréal, il y a erreur, renverse le dit jugement, et rendant le jugement que la dite cour de première instance aurait dû rendre, condamne le dit défendeur intimé à payer l'appelant es qualité la somme de $1000 avec intérêt, etc."

Béique, McGoun & Emard, attorneys for appellant.

Lacoste, Globensky, Bisaillon & Brosseau, attorneys for respondent.

(J. K.)

May 26, 1885.

Coram DORION, C.J., MONK, J., TESSIER, J., CROSS, J., BABY, J.

LA COMPAGNIE DU GRAND TRONC DE CHEMIN DE FER DU CANADA

(*Defendant in Court below*),

APPELLANT;

AND

WILLIAM MEEGAN

(*Plaintiff in Court below*),

RESPONDENT.

Railway—Damage caused by sparks from locomotive—Responsibility.

HELD:—That a railway company is responsible for damages caused by sparks from its locomotive, notwithstanding the fact that the company has complied with all the requirements of the law, and has used the most approved appliances to prevent the escape of sparks.

The appeal was from a judgment of the Superior Court, Montreal, JETTÉ, J., maintaining an action brought by the respondent, claiming damages for the burning of his barn, which was set on fire by sparks from the appellant's locomotive.

G. Macrae, Q. C., for the appellant.

C. A. Geoffrion, Q. C., for the respondent.

CROSS, J.:—

Meegan is the owner of a farm at St. Zotique, near the River Beaudette Station of the Grand Trunk Railway Company. He brought the present action against that company for the value of a barn and its contents destroyed by fire on or about the 6th November, 1881, which fire, he alleges, was communicated to his barn by sparks from a locomotive of the Company being at that date run over their railway in the vicinity, the whole through the carelessness and fault of the servants of the Company.

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To this action the Company pleaded that the alleged damage was not caused by any act of omission, neglect or wrongful conduct of the Company or their servants, but by the default, neglect or imprudence of Meegan himself, who could have prevented it by ordinary care; that the Company and their servants complied with all the requirements of the law, and used all due and necessary precautions, more especially to prevent the issue of sparks or cinders from their locomotives, and were not responsible for any damage that might have occurred.

It is established by numerous witnesses that while the locomotive was seen approaching from the West on the morning in question the smoke-stack was emitting a thick, black smoke intermixed with sparks; a north wind prevailed, which blew this smoke right on to Meegan's barn, and within a few minutes afterwards the flames were discovered in the upper part of the interior of the barn, which was distant from the railway about 140 feet.

On the other hand, it was attempted to be shown that steam was shut off on approaching the station and opposite Meegan's barn, and that sparks could not escape while steam was so shut off; that even if the steam had not been shut off, sparks could not be carried alive for such a distance from a coal-burning engine, which the one in question was, and which in this respect is different and less dangerous than a wood-burner.

Notwithstanding the force of this evidence the Judge of the Superior Court attached greater weight to that of the witnesses who actually saw the smoke and sparks bearing on the barn, and concluded that he was warranted in the inference that the fire had been communicated to Meegan's barn by the sparks from the Company's engine. We do not feel justified in saying that this view was erroneous.

Again, it is suggested that it appears from the evidence that Meegan was open to the charge of negligence from the fact that a considerable opening was left over his barn door, which unnecessarily exposed the interior to be entered by the sparks if driven thither by the wind.

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But it is explained that it is customary to leave such openings for the purpose of ventilation, and a proprietor is surely fairly entitled to follow his own fancy in the form of his building.

There is a further proof which is of more importance, viz., that the Company had adopted every precaution by known appliances to prevent the escape of sparks, using the most approved appliances devised for that purpose, such as required by law; they were consequently not guilty of fault, and were not liable. This raises a very important question, and probably by the rule of the English law applicable to the case the Company might be held excused, but I believe our rule has always been different. Our Courts have continually held that the party exercising a dangerous occupation is responsible to his neighbours for the damage that may be caused to them by the hazardous nature of such occupation. There was the celebrated case of *Molson* v. *St. Louis*,(1) where sparks were communicated from the funnel of a steamboat and the owner was held liable. And see Dalloz for 1859, Part 2, p. 187. It is not a case of trespass on the road, where it would be incumbent on the trespasser to prove fault.

We conclude that the judgment of the Superior Court, holding the Company liable, must be confirmed.

Judgment confirmed.

Geo. Macrae, Q.C., for appellant.

Geoffrion, Rinfret & Dorion for respondent.

(J. K.)

(1) Unreported.

March 24, 1885.

Coram DORION, C.J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

DAME MARY WYLIE ET VIR
(*Defendant in Court below*),
APPELLANT;

AND

LA CITÉ DE MONTRÉAL
(*Plaintiff in Court below*),
RESPONDENT.

Taxes—Exemption—Educational Institution—42 Vic., c. 6, s. 26.

HELD:—That a school for the education of young ladies, kept by a private individual and not under public control, is not an "educational institution" within the exemption of 41 Vict. (Q.), c. 6, s. 26.

The appeal was from a judgment of the Superior Court, Montreal, RAINVILLE, J., maintaining an action brought by the respondent for taxes. The judgment of the Court below will be found in 7 Legal News, at p. 26.

Kerr, Q.C. for the Appellant.

Roy, Q.C., for the Respondent.

CROSS, J. *diss.* :—

The Corporation of the City of Montreal sue Dame Mary Wylie, Mrs. Watson, for $440.80, arrears of taxes on a property belonging to her in St. Antoine Ward of the said City.

Mrs. Watson defends herself upon the ground that the property in question is occupied by her exclusively as a boarding and day school for girls, receiving no grant from the Corporation and as such is an Educational Institution exempt from taxation, in terms of the Educational laws in force in the Province of Quebec.

The facts as pleaded are admitted, especially that the property in question has been, for the time the taxes are claimed, occupied by Mrs. Watson as a boarding and day day school for girls. The question at issue is one purely

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of law depending on the construction to be put upon the provisions of the different Statutes in force relating to the subject.

The judge presiding in the Superior Court expressed himself to the effect that the sole question to determine was, whether Mrs. Watson's School was an Educational Institution within the terms of the Statute of Quebec, 41 Vic., cap. 6, sec. 26; he was of opinion that it was not, he accordingly rejected the defence and gave the Corporation judgment for the amount demanded. The correctness of this judgment is brought in question by the present appeal.

The statutory provisions on the subject are to be found;—first in the Consolidated Statutes for Lower Canada, cap. 15, sec. 77.

This section gives three classes of exemptions, the second of which only is applicable, it reads as follows: § 2. All buildings set apart for purposes of Education or of Religious worship, Parsonage Houses, and all Charitable Institutions or Hospitals, incorporated by Act of Parliament, and the ground or land upon which such buildings are erected and also all burial grounds, shall be exempt from all rates imposed for the purposes of this act.

It will be observed that the language used importing exemption is general, it includes all cases pertaining to the several classes therein designated. The only exception to this is the limitation in the case of Hospitals or Charitable Institutions, which require to be incorporated by Act of Parliament to bring them within the description entitling them to exemption. Educational Institutions are not confined to those recognised by the Government nor to those obtaining subsidies from the Government; the Act by its title purports to be an act respecting Provincial aid for Superior Education and Normal and Common Schools, but the subjects of exemption are not confined to the property of Government Schools, nor to schools in any restricted sense, they are generally of all Educational Institutions, they go further, they include property set apart for Public Worship and Parsonage Houses, also all burial

grounds. They must therefore of necessity include all buildings set apart for purposes of education and the ground upon which such buildings are erected, and that without any restriction or qualification whatever.

There is, secondly, the extension of the scope of the exemptions in the case of Educational Institutions, by the Statute of Quebec, 41 Vic., c. 6, sec. 26, which reads as follows: "Every Educational Institution receiving no grant from the Corporation or Municipality in which they are situated, and the land on which they are erected and its dependencies, shall be exempted from Municipal and School taxes, whatever may be the act or charter under which such taxes are imposed, notwithstanding any provision to the contrary."

It is conceded that the Institution in question receives no grant from the City Corporation, therefore in this respect it falls within the class of cases provided for by sec. 26 of the 41 Vic., cap. 6, provided it is an Educational Institution within the meaning of that section, which is in fact the only question to be solved. A boarding and day School for Girls must undoubtedly be presumed to be an Educational Institution, a presumption that must prevail until the contrary is established, and according to the view here adopted there is no necessity for its being one of the Schools or Institutions recognised by the Government by being subsidised or otherwise; so long as it is found to answer to the description of an Educational Institution, it is within the statutory exemption. So far as there being a necessity for recognition by Government or any public authority, the very ground on which it acquires its right of exemption from Municipal taxes is that it receives no aid from the public, that is, through the City Corporation. It gives value to the public without receiving any thing in return, unless it be the exemption from taxation, and if that is denied, it suffers a double injustice. It takes part of the burthen of education off the Government without receiving any subsidy, and by the judgment of the majority of this Court, it is not even to enjoy exemption from taxation.

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This conclusion is further supported by the analogy to be drawn from the authority given to the Superintendent of Education to apportion monies from the income fund as directed by sec. 6, of said cap. 15, of the Consolidated Statutes for Lower Canada, which reads as follows: The said income fund or such part thereof as the Governor in Council may from time to time direct, shall be annually apportioned by the Superintendent of Education for Lower Canada in such manner and to and among such Universities, Colleges, Seminaries, Academies, High or Superior Schools, Model Schools and *Educational Institutions* other than the ordinary Elementary Schools, and in such sums or proportions to each of them as the Governor in Council approves.

This would seem to indicate that the term "Educational "Institutions" was used in the Statutes in a very general sense. Those of them who received appropriations would certainly be considered as falling within the description, but that fact could not of itself give them the rank, unless entitled to it by the characteristics they possessed of a nature to bring them within the description, and these characteristics would have the effect of doing so whether they got an appropriation or not; therefore Educational Institutions existed, or could exist, in contemplation of these Statutes, altogether outside of Institutions organised or recognised by the Government. The case of *Chegary* v. *Jenkins*, 3 Sandford, 413, is not applicable, it was determined by express statutory provisions inapplicable here. As to the difficulty suggested of determining what was and what was not an Educational Institution, none of a serious character could occur, at least in cases like the present, and if a fraud in this respect were attempted, it could be easily detected and put down. I remember an earlier stage of our educational laws when money raised by subscription for a common school enabled it to obtain an equivalent grant from the Government. In my opinion the judgment of the Superior Court in this case should be reversed and the action of the City dismissed.

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MONK, J. (*diss.*) :—

I am also compelled to enter my dissent from the judgment about to be pronounced in this case. The whole question is whether the establishment of the appellant is an educational establishment. The appellant is a lady, highly respectable, and her school is a very respectable institution. She has no assistance from the Government or from the municipality. If, then, this be an institution for the education of youth, I do not see how it is possible, under the statute, to impose a tax upon it. It is either an educational institution or it is not. If it is not an educational institution, it is a mere private dwelling, a sham. Is that pretension urged by any one in the present case? It is called a speculation, but is there any proof of that? It is said, it is of a temporary character. But so is everything in this world. I think it would be a great hardship, and more than a hardship, an injustice, and more than an injustice, an illegality, to impose a tax upon an institution such as that of the appellant, upon the pretence that it is merely temporary.

RAMSAY, J :—

This case offers a good deal of difficulty. The statute exempts "every educational institution" from the payment of municipal and school taxes. The appellants keep a school described as "a private boarding and day school for girls," and it is the municipal taxation on the property so used which it is sought by this action to recover. In some sense this is an educational institution, but the real question is whether this is an educational institution within the meaning of the Act. I think it is not. The object of the law is to protect against taxation those educational institutions which have no other *raison d'être* than the purposes of education. The instant they have another object they cease to be solely educational institutions; their revenues may be employed in other ways from which the community derives no benefit, and to protect these revenues from taxation would simply be to further a private speculation at the public cost. For these reasons I am to confirm.

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DORION, C. J. :—

I concur in maintaining the judgment appealed from in the present case. In 1845, when this law came into force, it applied only to school taxes. It was in these terms:— "All buildings set apart for purposes of education, or of "religious worship, parsonage houses, and all charitable "institutions or hospitals incorporated by Act of Parlia- "ment, and the ground or land on which such buildings "are erected, and also all burial grounds, shall be exempt "from all rates imposed for the purposes of this Act:" C. S. L. C. c. 15, s. 77. In 1878, an amendment was made, the effect of which was to exempt "educational institutions" from municipal and school taxes. The question arises, are the educational institutions mentioned in the amending Act the same as the buildings set apart for purposes of education under the original statute? Was it the intention of the legislature to exempt from municipal and school taxes only those institutions which formerly were exempt from school taxes? The clause gives rise to considerable difficulty; but we have to put some interpretation on it. It would appear from the terms of the amending act that only such institutions as might receive a municipal grant, and which do not receive such grant, are exempt. Now there is nothing in the municipal law of this country that would authorize a municipality to make a grant to a private school; yet it is only in lieu of a grant that exemption from taxation is accorded. That a private school is an educational institution is doubtless true in a sense, but if we hold that a private school in which eight or ten children are instructed is exempt from taxation, it would follow that a father who has his children instructed in his own house would be exempt, because his house would be an educational institution. So, too, a lawyer's office in which three or four students are being instructed would be exempt, for it would be an educational institution. You might come down to the dancing master, for he would perhaps make a similar claim to exemption. It will be observed that only hospitals incorporated by Act of Parliament are exempt. Why should not private hospitals be

exempt if private schools are to be exempt? The clause undoubtedly gives rise to great difficulty from the way in which it is drawn, but I cannot think that the amendment of 1878 was intended to exempt, from both municipal and school taxes, any institutions which before were not exempt from school taxes. I therefore think the judgment should be confirmed.

Judgment confirmed.

Kerr, Carter & Goldstein, for the Appellant.

R. Roy, Q. C., for the Respondent.

(J. K.)

September 24, 1885.

Coram SIR A. A. DORION, C.J., MONK, RAMSAY & CROSS, JJ.

ARCHIBALD A. DICKSON ET AL.
(*Defendants in the court below*)
APPELLANTS;

AND

THE HON. SIR A. T. GALT,
(*Plaintiff in the court below*)
RESPONDENT.

Motion to quash appeal—Acquiescence—Art. 1130 *C. C. P.—Effect of acquiescence of one defendant on his co-defendant.*

HELD:—1. That a letter written by one of the defendants in an hypothecary action to the plaintiff's attorneys after the rendering of the judgment, which condemned them as joint undivided owners of an immoveable to abandon it or pay the plaintiff's claim, and before the institution of the appeal, asking for delay until said defendant could get his *garans* to pay the claim, and promising to settle with the plaintiff if the *garans* did not, constituted an acquiescence in the judgment *a quo* on the part of said defendant, and that his appeal would be dismissed on motion.

2. That the other defendant was not bound by this acquiescence as it did not appear that any partnership existed between him and his co-defendant (beyond the joint ownership of the immoveable in question), or that he had authorized the writing of the said letter.

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Dickson & Galt.

DORION, C. J. :—

The appellants (defendants in the court below) were condemned as joint undivided owners of an immoveable to make a *délaissement* or pay the respondent's hypothecary claim. This judgment was rendered on the 29th November 1884. Some time after the rendering of the judgment, and before the entering of the appeal, there appears to have been an interview between the respondent's agent, Mr. Joseph Rielle, and the two appellants, Dickson and Wanless, at which the latter asked for delay in order to protest their *garans* the Jacques-Cartier Building Society, and to make them settle the claim. What the appellants said at this interview is not very clearly established, as the affidavits filed are somewhat contradictory. Mr. Rielle says that Dickson and Wanless asked for delay to enable them to induce the Building Society to pay the judgment, and promised that they (appellants) would settle it if the society did not. Dickson and Wanless, on the other hand, say that they merely asked for delay to get the Building Society to pay, but deny that they ever agreed to settle if their *garans* did not. With these conflicting accounts before us we can hardly say that an acquiescence on the part of the appellants can be inferred from these verbal negociations.

The appellant Dickson, however, on the 19th January, 1885, wrote a letter to the respondent's attorneys, in answer to one written by the latter to Dickson's attorneys threatening execution, in which he renewed his application for delay, and explicitly promised to settle with the plaintiff if his *garans* did not. The letter is in the following terms:

Montreal, January 19th, 1885.

MESSRS WOTHERSPOON & LAFLEUR,
Advocates, &c.,
City.

Dear Sirs,

GALT & DICKSON.

I have just received a letter from you addressed to Messrs Greenshields & Co.

You must remember I purchased the property from the Building

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Society *with warranty*. The papers are in the hands of my notary having a protest, &c., drawn for service on the Society. So soon as the time given them to pay the amount expires and if they do not, I shall then settle with you and look to them for the same.

Yours truly,

(Sd) A. A. DICKSON.

There can be no doubt that as far as the appellant Dickson is concerned this letter constitutes an acquiescence in the judgment, and that he has forfeited his right to appeal. It was contended on behalf of the respondent that the appellant Wanless was also bound by this letter, inasmuch as he was jointly and severally bound with Dickson to pay the amount of the condemnation. But there does not appear to have been any partnership between the appellants (beyond the fact that they were joint undivided owners of the immoveable in question), or anything to authorize one of them to bind the other by an act of renunciation or acquiescence.

We are accordingly of opinion that the motion should be granted with costs against Dickson, and his appeal dismissed, and that as regards Wanless the motion should be rejected without costs.

Greenshields, McCorkill & Guerin, for appellants.

Lafleur & Rielle, for respondent.

(E. L.)

Authorities cited by respondent in support of his motion:

C. C. P. art. 1130, §4. Guyot, Rép., Vo. 'Acquiescement.' Pothier, Proc. Civ. No. 335, §2. Jousse, Vol. II, p. 441. Merlin, Rép. Vo. 'Acquiescement.' Dalloz (Alphab.), Vo. 'Acquiescement.' Carré & Chauveau, Vol. II, quest. 664. Talandier, Traité de l'Appel, p. 76. Toullier, Vol. X, No. 106. Charbonneau & Davis & al.—20 L. C. J. 167.

20 mai 1885.

Coram SIR A. A. DORION, J.C., RAMSAY, TESSIER, CROSS & BABY, JJ.

JOHN McMILLAN,
(*Défendeur en Cour inférieure*),
APPELANT ;

ET

DAME ANGÉLIQUE HEDGE ET VIR,
(*Demandeurs en Cour inférieure*),
INTIMÉS ;

ET

THE DOMINION ABATTOIR AND STOCK YARDS COMPANY (Limited),
(*Défenderesse en Cour inférieure*),
APPELANTE ;

ET

DAME ANGÉLIQUE HEDGE ET VIR,
(*Demandeurs en Cour inférieure*),
INTIMÉS.

Servitude de passage—Aggravation—Changement de destination—Art. 558 *C. C.*

Le propriétaire d'un fonds en culture en vendant deux lots détachés de ce fonds avait établi une servitude de passage à pied et en voiture en faveur de ces lots sur une autre partie du dit fonds, avec stipulation portant que les barrières fussent tenues fermées. Sur l'un des lots ainsi cédés une raffinerie d'huile de charbon, et sur l'autre un abattoir, furent subséquemment érigés, et pour l'exploitation de ces deux industries les propriétaires des fonds dominants firent passer journellement un grand nombre de bestiaux et voitures par le dit passage, de telle sorte que les barrières étaient toujours ouvertes :—

JUGÉ :—(Ramsay & Cross, JJ., *diss.*)

Que dans les circonstances il y avait aggravation de la servitude aux termes de l'art. 558 C. C., et que le propriétaire du fonds servant était bien fondé à demander des dommages pour l'abus du droit de passage, et une défense pour l'avenir de s'en servir pour l'exploitation des dites industries.

Les deux jugements dont est appel ont été rendus par

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l'honorable Juge Jetté le 4 septembre 1883, et comme ils sont tous les deux identiques, (*mutatis mutandis*), le texte du jugement dans la première de ces causes expliquera suffisamment la question soumise au tribunal. Ce jugement est rédigé dans les termes suivants :—

" La Cour après avoir entendu la plaidoirie contradictoire des avocats des parties sur le fond du procès mû entre elles, pris connaissance des écritures des dites parties faites pour l'instruction de leur cause, examiné leurs pièces et productions respectives, entendu et dûment considéré la preuve et sur le tout délibéré :—Attendu que la demanderesse est propriétaire d'un immeuble situé en la Ville de St. Henri, portant No. 1710, au Cadastre de la paroisse de Montréal, et faisant front à la rue St. Henri de la dite Ville :—

" Attendu que cet immeuble est sujet en faveur du défendeur à une servitude de passage établie par les titres suivants, savoir :—

1o. Un acte de vente en date du dix-sept septembre mil huit cent cinquante-deux par Germain Lefebvre à Michael Reilly, et 2o. un acte de vente du deux mars 1853 par le même Lefebvre à Patrick Carroll, cette servitude étant établie dans les termes suivants, savoir : " With the " right for ever for the said purchaser his heirs and assigns " of a passage through the lot of land of the said vendor " fronting the public road, as well on foot as with carriage, " in common with said Reilly, his heirs and assigns and " the said vendor his heirs and assigns, to communicate " from the hereby sold lot of land to the said public road " leading from Montreal to Lachine, and to the charge by " the said purchaser his heirs and assigns of keeping in " good order of repairs the road of the said passage at " common expenses with the said Reilly his heirs and " assigns as they thought proper between them, and also " to the charge to the said purchaser of keeping the gates " of said passage shut."

" Attendu que le onze septembre 1873 le défendeur a acquis de Michael Carroll partie du terrain en faveur duquel a été établi le droit de passage susdit :

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" Attendu que la demanderesse poursuit maintenant le défendeur, alléguant que lors de l'établissement de cette servitude le terrain en faveur duquel le dit droit de passage était stipulé était exploité pour des fins de culture exclusivement, qu'il était convenu que le propriétaire du fonds dominant fermerait les barrières comme susdit, et que néanmoins le défendeur 1o. Refuse de fermer les barrières nonobstant mise en demeure formelle à cet égard, et 2o. Aggrave la dite servitude en se servant du passage susmentionné, non pour des fins de culture, mais pour la raffinerie de l'huile de charbon et le commerce de cette huile qu'il exerce dans des proportions considérables sur le dit terrain par lui possédé comme susdit : et qu'elle conclut en conséquence à ce que le défendeur soit limité à ce que lui reconnaît son titre et condamné à quatre cents piastres pour la négligence et l'abus susdits ;

" Attendu que le défendeur nie la restriction alléguée de son droit : qu'il soutient que celui-ci est absolu et que par suite il peut se servir du dit passage pour l'exploitation de son terrain à quelque fin qu'il l'emploie, que d'ailleurs les constructions par lui élevées sur son dit terrain pour les fins de son commerce ont été bâties au vu et su de la demanderesse et de son consentement tacite : que le passage en question est ouvert au public depuis trente ans et que la demanderesse n'a aujourd'hui aucun intérêt à restreindre l'emploi qu'en fait le défendeur, enfin que la demanderesse n'a souffert aucun dommage à raison des faits dont elle se plaint ;

" Considérant qu'en principe celui qui a un droit de passage par un fonds de terre ne peut, en changeant l'exploitation du fonds dominant et y élevant des constructions nouvelles attribuées à l'exercice d'une industrie non prévue par les parties lors de la constitution de la servitude, soumettre le fonds servant à la circulation additionnelle causée par ces constructions et cette exploitation nouvelle ;

" Considérant en outre que les circonstances dans lesquelles se trouvent les héritages au moment de l'établissement de la servitude et la possession qui a lieu immé-

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diatement après, doivent, dans le silence du titre, servir à expliquer l'intention des parties et à déterminer l'étendue du droit accordé ;

" Considérant qu'il est établi en preuve dans l'espèce, que lors de l'établissement du droit de passage susdit en 1852, l'héritage en faveur duquel ce droit était accordé n'était exploité que pour des fins de culture et qu'il a continué de l'être ainsi jusqu'à l'achat qu'en a fait le défendeur en 1873, mais que depuis lors le défendeur y a érigé des usines et bâtisses considérables pour les fins de son industrie et de son commerce, savoir: la raffinerie et la vente des huiles de charbon, et qu'il y débite sa dite marchandise en grandes quantités, ce qui occasionne une allée et venue constante par le dit passage d'une moyenne par jour de quinze à vingt voitures lourdement chargées ;

" Considérant qu'il est de plus prouvé que cette circulation est beaucoup plus considérable et plus onéreuse que celle qu'aurait nécessité l'exploitation en culture du dit fonds de terre du défendeur, et qu'elle constitue en conséquence une aggravation notable de la servitude que ni les titres, ni les circonstances des héritages ne justifient ;

" Considérant en outre que la demanderesse est aussi bien fondée à se plaindre de la négligence et du refus du défendeur et de ses employés de fermer la barrière par elle posée à l'entrée du dit passage ;

" Considérant enfin que le défendeur n'a pas prouvé que le dit passage ait été ouvert au public depuis trente ans, ni qu'il ait eu le droit d'en user comme il l'a fait ;

" Renvoie la défense du défendeur et accordant les conclusions de la demande, déclare 1o. que le défendeur n'a droit de se servir du passage susdit que pour l'exploitation de son fonds pour des fins de culture et de jardinage seulement ; et 2o. qu'il est tenu en exerçant son droit susdit de fermer les barrières du dit passage ; et en conséquence ordonne et enjoint au défendeur de ne se servir à l'avenir du dit passage que pour les fins de l'exploitation par la culture du fonds par lui possédé, lui faisant défense et prohibition d'en user pour les fins des usines et constructions par lui érigées pour son commerce d'huile ;

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"Ordonne en outre au dit défendeur d'avoir à fermer les barrières du dit passage lorsqu'il s'en servira: et enfin condamne le défendeur a raison de l'abus par lui fait de son droit à payer à la demanderesse la somme de cent piastres de dommages et les dépens de l'action telle qu'intentée, etc."

EN APPEL:

RAMSAY, J. (*diss.*):—

The appellants in these two cases and the respondent have a common *auteur*, who granted to appellants by different deeds, their heirs and assigns, forever, the right of way, in its amplest form, over the property now held by respondent, to communicate from the land, sold by him to appellants, to the public road leading from Montreal to Lachine. The purchasers were to keep the road in good repair at their common expense, as they thought proper between them, and they were to keep the gates of the said passage shut. Respondent complains that they have aggravated the servitude, the one by establishing an oil-factory, the other by erecting a slaughter-house, thus causing a great increase in the *use* of the servitude, and that they leave the gate open, and for these two causes she demands damages, and also takes conclusions forbidding appellants to use the right of way as they are doing for the utility of these works. Respondent founds her claim on art. 558 C. C., and on the authority of decisions of writers under the Code Napoléon.

It must be admitted that many of the modern French writers maintain, and some of the courts of appeal have held, that the great use may amount to an aggravation. The theory seems to be this, that the intention of the grantor must be presumed to be that the grant was for the present use of the property. So it was held, that where the business was changed from retail to wholesale, causing thereby a considerable increase of traffic, it was an aggravation of the servitude. Sirey, 2ème partie, p. 44, and the cases cited in the note.

This jurisprudence and the opinion of writers is worthy

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of great consideration, for the articles of Code Napoléon and of our Code do not appear to me to be materially different. But it is only binding upon us in so far as it is conformable to principle. And in the first place, it is to be remarked that it does not stand uncontradicted. Laurent, vol. 8, §§. 230, 231, 232, 234, protests against this exceptional mode of dealing with the intention of parties to a contract. Also there are conflicting decisions a number of which arementioned by Laurent in the paragraphs already quoted. Secondly, it seems contrary to the terms of the Code Napoléon, art. 686, "L'usage et l'é-"tendue des servitudes se règlent par le titre qui les "constitue ; *à défaut* de titre, par les règles ci-après." Art. 545 of our Code is equally explicit. Thirdly, it is against the old law and, admittedly, incompatible with the doctrine of Dumoulin. If so strange an exception to the mode of interpreting contracts had existed, there would have been plenty of traces of it ; but the writers on presumptions are silent as to this one. It would be a most gratuitous presumption, in a case like the present, that the purchaser of a property *enclavée*, who also acquired the right of way to reach his land from the highway, should bargain with the vendor for a right of way less extensive than his right of property in the land. Of course it is all a matter of contract, so if not stipulated it does not exist where *une terre enclavée* is sold. Basnage, 2, 486. Fourthly, it seems to be specially opposed to all the general principles recognized as relating to servitudes. For instance, a servitude is a right due to the *héritage dominant* rather than to the owner. Cujas, 4, c. 881, B. Plainly it would be a contradiction of that doctrine to say that the accidental use of the owner should control the right accorded to the *héritage dominant*. Article 556 of our Code appears to me to preclude the possibility of contending that the greater use, by itself, is an aggravation of the servitude ; and article 558 only applies to a particular case, the principle recognized by art. 545. There is another principle which seems to me to meet the difficulty, which, evidently, has started the modern

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doctrine—that is, the hardship of the increased use. It is said, that the parties who granted a right of way to a farm, might not have contemplated the building of a row of houses. That is perfectly true of many things besides a servitude; and it is particularly true of servitudes, as of all incorporeal rights. They belong *ad conditionem incerti, non ad certi.* Cujas 4, c. 645 D. They cannot be counted or measured or weighed. "Certum non "est nisi substantia, accidentia, non certa hinc fit, ut "qui servitutes stipuletur." Cujas 10, c. 541, A.

Another point was slightly insisted on, that the right of the road could not be unlimited without destroying the rights of those having a common right. I am inclined to think, as a general proposition of law, that an action might lie to define the extent of the use provided the plaintiff could show that his fair use was obstructed. All commoners are liable to such restrictions. Even there may be the mis-use of a street, although each act does not amount in itself to a nuisance. Of course it would require a very extreme case to give a right of action, and therefore in towns municipal authority regulates traffic so as to avoid a collision of rights. Processions for rejoicings and funerals are provided for by law on these principles. But in this action no question of conflict of enjoyment is raised. It is distinctly alleged that at the time of the sale and of the constitution of the servitude the land sold was "*en culture.*" That since then the owner had constructed "*une raffinerie d'huile de charbon, des usines, etc.*

"*Que pour les fins de cette usine et de ce commerce, le défendeur se sert constamment du dit passage sur le terrain de la demanderesse.*" "*Que le défendeur abuse par ce moyen du droit de servitude qui lui a été accordé et en rend l'usage beaucoup plus onéreux pour la défenderesse.*"

Wherefore it is prayed that the defendant be forbidden to use the road, not so much, but at all, for the purposes of the said *usine*, etc.

One other point was mentioned: that the excessive use of the road injured the road-way. But respondent has no interest in this. She has agreed that Reilly & Carroll

should keep the road in repair at their common expense, "as they thought proper between them." It does not seem that they have disagreed about this, or troubled her in any way about it.

The action as regards the shutting of the gate is evidently a make-weight; but strictly speaking it is founded. The answer of appellants is absurd. I am to reverse as to the use of the right of way; to maintain as to the shutting of the gate, and to reform the decision as to damages, giving the respondent $10 for the neglect to shut the gate, costs against appellants in the court below and in their favor in the court of appeal in each case.

SIR A. A. DORION, J. C.:—

La question qui se présente dans ces deux causes est d'une importance considérable. Le propriétaire d'un immeuble situé à St. Henri avait vendu deux portions de cet immeuble aux auteurs des appelants par deux titres différents, en établissant en faveur des acheteurs une servitude de passage dans les termes suivants:—

"With the right for ever for the said purchaser, his "heirs and assigns, of a passage through the lot of land "of the said vendor, fronting the public road, as well on "foot as with carriage, in common with the said Reilly, "his heirs and assigns, and the said vendor, his heirs and "assigns, to communicate from the hereby sold lot of land "to the said public road, leading from Montreal to La-"chine, and to the charge by the said purchaser, his heirs "and assigns, of keeping in good order of repairs the road "of the said passage at common expenses with the said "Reilly, his heirs and assigns, as they thought it proper "between them, and also to the charge to the said pur-"chaser of keeping the gates of said passage shut."

Les acheteurs de ces deux fonds dominants, les ont subséquemment vendus, l'un à la Compagnie des Abattoirs, et l'autre à McMillan qui y a établi une raffinerie d'huile de charbon. L'intimée, propriétaire du fonds servant, poursuit les appelants pour avoir aggravé cette servitude de passage, et pour avoir négligé de fermer les barrières

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nonobstant mise en demeure. Il serait difficile de trouver deux industries dont le voisinage serait plus dommageable que celles des appelants, mais ce n'est pas là ce dont se plaint l'intimée. Elle leur dit : vous avez un droit de passage pour les fins pour lesquelles il a été établi par l'acte constitutif de la servitude, mais non pas pour les fins du commerce que vous y avez subséquemment établi. Il est en preuve que lors de l'établissement de cette servitude tout le terrain vendu aux nommés Reilly et Carroll (qui ont vendu aux appelants) était en culture.

La question est donc de savoir si l'usage que les appelants font maintenant de ce droit de passage constitue en droit une aggravation de la dite servitude.

Pour se faire une idée de l'étendue de l'usage de ce passage par les appelants pour les fins de leurs industries respectives, il suffit de lire la déposition de Louis Gagné, un des témoins de la demanderesse. (Voir l'Appendice du Factum de l'intimée, p. 13). Ce témoin établit que le 13 décembre 1883 il a passé par le dit chemin 449 bêtes et voitures, et le jour suivant à peu près 440 bêtes et voitures. C'est-à-dire que ce passage dont les barrières devaient être fermées a donné passage à presque 450 bêtes ou voitures par jour! Les appelants prétendent que cela ne constitue pas une aggravation de la servitude, attendu que cela n'en change pas la nature. Mais ce n'est pas ainsi que je comprends la loi. L'article 558 de notre Code civil se lit comme suit : " De son côté, celui qui a un droit " de servitude ne peut en user que suivant son titre, sans " pouvoir faire, ni dans le fonds qui doit la servitude, ni " dans celui à qui elle est due, de changement qui aggrave " la condition du premier." Les codificateurs nous apprennent dans leur rapport (Liv. II, Tit. IV, art. 63) que cet article est conforme au Code Napoléon, à l'ancien droit français et au droit romain. Dans le cas actuel nous avons une servitude créée par la volonté de l'homme, et nous devons rechercher l'intention de celui qui l'a établie pour déterminer l'étendue de la jouissance qu'il a voulu accorder. *Demolombe* (vol. XII : No. 850) qui suit l'opinion de Domat, pense que les besoins du fonds dominant doivent être appréciés

eu égard à l'état où il se trouvait au moment de l'établissement de la servitude. " C'est qu'en effet," dit-il, " la " servitude ne dérive que du consentement expresse ou " tacite, suivant le cas, du propriétaire du fonds servant ; " or, ce propriétaire n'a évidemment consenti à la servi- " tude que pour le service et l'exploitation du fonds domi- " nant, tel qu'il l'a vu au moment où la servitude a été " établie.

" Si donc, par exemple, vous avez sur mon fonds un " droit de puisage ou de passage pour telle maison déter- " minée, vous ne pourrez pas l'étendre à une autre mai- " son, soit que vous en fussiez déjà propriétaire au moment " de la constitution de la servitude, soit que vous l'ayez " bâtie ou achetée depuis.

" Autrement on pourrait faire ainsi, dit encore fort jus- " tement Dumoulin, d'un chemin privé *de itinere privato*, " une sorte de chemin vicinal ou public, *via vicinalis vel* " *publica*."

Toullier, (vol. III, No. 550) s'exprime dans le même sens. " Le propriétaire d'un fonds de terre, en faveur " duquel serait établi un droit de passage, ne pourrait, en " y faisant bâtir, garder le fonds servant du passage né- " cessaire pour le service d'une maison, car il est évident " que le passage journalier de tous les habitants d'une " maison, est plus onéreux que le passage pour le service " d'un fonds de terre.

" Ce serait, d'ailleurs, changer la qualité du droit, et " convertir une servitude rurale en servitude urbaine ; ce " qui serait contraire à la loi de la concession et au prin- " cipe qui en dérive, qu'on ne peut, en aucune manière, " aggraver la condition du fonds servant."

Voir *eodem sensu*, *Aubry & Rau*, vol. III, page 28 ; *Pardessus*, vol. I, No. 236.

Laurent, (vol. VIII, Nos. 261, 262, 263, 264) n'admet la doctrine de Dumoulin qu'avec certaines restrictions. " Le " principe implique une servitude restreinte aux besoins " du fonds, ce qui suppose une servitude limitée, dont il " s'agit de préciser la limite. Or, il se peut qu'une servi- " tude soit établie en vue des besoins actuels et futurs ;

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" dans ce cas, il ne peut plus être question de rechercher " la mesure des besoins à l'époque où elle a été constituée. " Il faut dire plus : à moins que la servitude ne soit limi- " tée à un usage particulier, il faut l'interpréter dans un " sens extensif plutôt que dans un sens restrictif. En " effet, les besoins actuels sont ceux du propriétaire de " l'héritage dominant ; or, la servitude est stipulée, mais " en vue du fonds, donc en vue de besoins variables." (No. 262). Et plus loin (No. 263 *sub fin.*) ce même auteur ajoute : " La question de savoir s'il y a aggravation " est donc essentiellement une question de fait. C'est au " juge du fait à apprécier le dommage qui résulte du chan- " gement fait par le propriétaire du fonds dominant. S'il " constate que le changement n'est pas de nature à nuire " au fonds servant, la décision ne peut être réformée par " la cour de cassation." Laurent examine ensuite la question du changement de la destination d'une maison, par exemple, quand une maison bourgeoise a été transformée en café ou en cercle, et il décide, se bâsant sur des arrêts qu'il cite, que l'aggravation est incontestable.

Nous croyons aussi avec Laurent que la question doit être décidée d'après les circonstances et d'après l'intention des parties.

Et dans l'espèce actuelle nous croyons que l'intention du propriétaire qui a établi la servitude dans les termes précités, avec une stipulation expresse que les barrières fussent fermées, ne pouvait pas être de permettre le passage de voitures et de bestiaux toute la journée. La majorité de cette cour est d'opinion qu'il y a dans le cas actuel une énorme aggravation de fait et de droit de la servitude, et que les deux jugements dont est appel doivent être confirmés avec dépens.

Jugements confirmés.

Davidson, Cross & Cross, pour l'appelant J. McMillan.

D. R. McCord, pour l'appelante la Cie. des Abattoirs.

Pagnuelo, Taillon & Lanctot, pour l'intimée.

(E. L.)

May 26, 1885.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

DONALD MACMASTER ET AL.
(*Defendants in the Court below*),
APPELLANTS;

AND

THOMAS W. MOFFATT
(*Plaintiff in the Court below*),
RESPONDENT.

Contract—Time for fulfilment.

M., against whom a *capias* had issued, deposited a cheque in the hands of appellants, the agreement being that if he appeared with his bail at their office by eleven o'clock on the following morning the cheque was to be returned; if he did not appear, the cheque was to be applied to the payment of debt and costs. There was a conflict of evidence as to whether M. appeared at eleven or a few minutes after, and (as the majority of the Court viewed the evidence) one of the bondsmen agreed upon was not present.

HELD (by the whole Court):—That a difference of a few minutes in a contract of this nature was too slight to be material, and would not have justified the application of the cheque to the payment of the debt and costs, if M. had appeared with his bail as agreed; but *held*, by the majority of the Court, the absence of one of the bondsmen was a non-compliance with the agreement, which justified the application of the cheque to the payment of the debt and costs.

The judgment appealed from was rendered by the Superior Court, Montreal, DOHERTY, J., Dec. 29, 1883, maintaining the action against the appellants, and condemning them as having wrongfully retained the sum of $400 belonging to the respondent, this sum being the amount of a cheque placed by respondent in their hands on the evening of 11th June, 1883, on an agreement as understood by appellants that if he failed to appear with his bail next morning by eleven o'clock, to put in bail in a *capias* case taken against him by one McLaughlan, the appellants, who were McLaughlan's attorneys, should apply the cheque in satisfaction of debt and costs. Moffatt, as was contended, not having appeared up to eleven o'clock, the cheque was applied in pursuance of the agreement.

N. W. Trenholme for appellants.

Joseph Doutre, Q.C., for respondent.

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CROSS, J. (*diss.*) :—

The defendants (appellants), a firm of advocates and attorneys, on behalf of C. H. McLaughlan, took out a *capias* against the now respondent Moffatt, who, thereunder, was brought or allowed to come to appellants' office, where he explained his desire not to be obliged to go to gaol, but to have temporary arrangements made by leaving in appellants' hands a cheque to cover the amount, endorsed by a friend (McLean), until he should put in bail, which he agreed to be ready to do by eleven o'clock next morning. The appellants were reluctant to accede to this arrangement, but after a time consented to it. A cheque was left for $400, ample to cover McLaughlan's claim and costs. Next day Moffatt wished to put in bail and get back his cheque, which was refused, the appellants contending that the agreement was that if Moffatt did not present himself with his bail at their (the appellants') office before eleven o'clock next morning, they would have a right to cash the cheque and apply the proceeds in payment of McLaughlan's debt, interest and costs; that Moffatt failed to be in attendance with his bail before eleven o'clock; they had therefore a right to refuse the return of the cheque and apply the proceeds as above. The respondent contends that he had complied with the terms of the understanding, and had been present with his bail before eleven a.m. On this contention a diversity of evidence has been produced—that of the two parties conflicting. The Superior Court considered that the dispute should not be governed by the exact official time, but that if Moffatt, by a reference in good faith to watches which might be fairly consulted as the Post Office clock, came within the time, it was sufficient. That Court consequently maintained an action against the appellants' firm of attorneys for the amount of the cheque, which judgment has given rise to the appeal.

First, see what the contract was, and Moffatt's duty thereunder. Mr. Macmaster states very distinctly that the understanding was that Moffatt was to be at appellants' office with his bail before eleven o'clock on the

morning of the 12th of June, 1883, in default of which appellants would have the right to apply the cheque. His partner, Mr. Weir, does not state the agreement in the same terms. (See appellant's evidence, p. 28.) He says the arrangement was that if Mr. Moffatt did not present himself before eleven o'clock the following morning, for the purpose of giving security, that then we, the agents for McLaughlan, would have the right to apply the proceeds of that cheque in payment of the debt and costs.

The respondent's evidence goes to shew that the agreement was that Moffatt was to be at appellants' office by eleven a.m., not before eleven a.m., to put in bail, but does not attach any distinct consequences to the default. Now with the divided evidence as regards the time of bail being present, although it were considered, for the sake of argument, that appellants' evidence is the most distinct on the point, yet it does not seem to me that the consequence of this bail being two or three minutes late involved the forfeiture of Moffatt's right to get back the cheque if ready to put in bail. The cheque was in place of the ordinary bail, until it should be furnished. It is proved beyond dispute that Moffatt was present at Mr. Macmaster's office before the expiry of the fixed delay, and that he had then secured the assent of sufficient bail. It was not for the appellants to accept or refuse that bail; this was the business of the Sheriff,—and it may be said that Moffatt should have gone to the Sheriff and put in bail; but it is in proof that he offered to do so or go to gaol, and demanded the return of his cheque. It was then at appellant's risk to return or not to return the writ as he saw fit; had they returned it, Moffatt might have put in bail and thus secured his right to contest the demand. If they did not return it, they rested the case entirely upon the agreement that they should apply the cheque to pay the debt, interest and costs. I think no such agreement has been made out, nor can it readily be presumed. Moffatt could not be supposed to be willing to abandon his right to dispute the plaintiff's claim and

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the rigorous proceeding of *capias*. Had he been willing to do so, he would have rather at once given the money as a payment. Then there was a surplus, which was tendered back in the form of a cheque and refused. This is, perhaps not, strictly speaking, a valid tender as the law stands, although I certainly think it ought to be. The check was not, in fact, applied when Moffatt was ready to put in bail; and if even he had been clearly later than he promised, his right to put in bail and contest the debt was not forfeited. I would scarcely approve of Mr. Macmaster making it as a personal matter. He insisted on a retraction being made of some supposed imputation on his conduct in the matter as a condition to his making a concession, the nature of which does not clearly appear,—and Mr. McLean, Mr. Moffatt's friend, was willing to go a certain length in order to arrive at a friendly understanding, but no agreement was come to. Any supposed admission of McLean, which was anything but conclusive, did not bind Moffatt.

Again, as regards the supposed contract relative to the cheque left by Moffatt which was endorsed by McLean. If evidence verbal is admissible as of a mercantile contract, the only evidence of it is by the parties interested—one defendant in favor of another; and suppose Mr. Macmaster's evidence is sufficient to exonerate Mr. Weir, Mr. Weir's is not sufficient to exonerate Mr. Macmaster. He does not say that by the contract Moffatt was to present himself with his bail before eleven o'clock, but he was to present himself before eleven o'clock for the purpose of giving security. Now, Mr. Hutchinson proves that he recollected seeing Moffatt early in the morning of the 12th sitting in the outer office; earlier in the morning than half-past ten he saw Moffatt sitting in the outer office. (See p. 36, appellants' appendix.) So that, according to Mr. Weir's evidence, he was at least half an hour before his time; but if Mr. Macmaster could make evidence for himself and the bail required to be there with him, then it depended on the question of minutes or seconds. Mr. Hutchinson says [at p. 34, l. 42]:—At the

time that Mr. Moffatt came in with his two securities, it was three or four minutes after eleven—at least three, of this he was positive. Moffatt was then there himself before half-past ten, and was there, with his two securities within three or four minutes of eleven on the morning of the 12th of June. No persons had been agreed upon as the bail. McLean had already given security by endorsing the cheque. He and Hopkins were there offering themselves as bail. (See p. 7, appendix.) I repeated the assertion that we were here to fulfil our agreement. Mr. Stewart had been secured in addition, but his name had not been communicated.

I think the judgment of the Superior Court was correct, and should be confirmed.

DORION, C.J. (*diss.*):—

The respondent, on the evening of the 11th June, 1883, deposited a cheque with Macmaster, Hutchinson & Weir, the condition being that he, the respondent, against whom a *capias* had issued, should be at liberty that night, but if he did not appear at appellants' office with his bondsmen by eleven o'clock the next morning and give security, the cheque was to be applied in payment of debt and costs. The whole question in the case is whether the respondent arrived with his bondsmen precisely at eleven o'clock or a few minutes later. James Stewart, who was to have become one of the sureties, did not arrive in time, but Hopkins and McLean were there, and ready to give security. Even admitting that they were not there at eleven precisely, I am not disposed to think that a person should be subjected to imprisonment because his sureties happen to arrive a few moments after the time agreed on. "By eleven o'clock" may fairly be taken to mean "about eleven o'clock." There was a substantial compliance with the agreement entered into, and therefore I am not disposed to disturb the judgment of the Court below.

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RAMSAY, J. :—

This action gives rise to two questions : First, what did the appellants agree to on the evening of the 11th June ? Second, what took place on the morning of the 12th ?

On the first question there is no sort of difficulty. The respondent was to be at appellants' office "*by eleven o'clock*" on the morning of the 12th with his bondsmen, and in that case the cheque was to be handed back to Moffatt, and to McLean who had endorsed it,—and McLean swears that he is morally convinced that Macmaster had a right to use it, if Moffatt was not there with his bondsmen *by* eleven o'clock.

The evidence does not appear to me to establish clearly that when Moffatt, Hopkins and McLean went to Mr. Macmaster's office on the morning of the 12th, the fatal moment had elapsed. On the contrary, I think that, if Stewart had been there instead of McLean, Moffatt would have complied with the conditions of the agreement so as to entitle him to get back his cheque ; but the fact is, McLean was not there as a bondsman at all—he went there to look after his own interest (pp. 5-6, R. appendix), to see "the thing properly completed," and the completion was that "the bondsmen were to become security." The proposed bondsmen were to be Hopkins and Stewart. It is true that when they were at Macmaster's office, McLean sought to get the cheque back before the bond was entered into. McLean said to the bailiff:—"I will take my cheque which I endorsed, as you see I am here with the necessary parties." But this was not true. One of the necessary parties was Mr. Stewart, and he avowedly never presented himself at Mr. Macmaster's office, but went to the Court House, where he arrived not earlier than twenty minutes past eleven. The difference between the Chief Justice and the majority of the Court turns entirely on this : that he is of opinion that McLean took Stewart's place, and that appellant has no cause to complain of this, as there was no engagement as to the parties who should be bondsmen ; while we think

that McLean was never offered as a bondsman, and indeed no bond has ever been tendered to this day, so far as we know.

The other dissent turns on two questions of fact: the one that there was no evidence to show that appellant had a right to apply the money to the payment of the debt, and that it was only a security; the other that it was not proved that the bondsmen were to go to appellants' office. It seems to me impossible to concur in these views after reading McLean's evidence. He is a witness evidently very favorable to Moffatt, and yet he is compelled unequivocally to admit that it was understood Macmaster had a right to apply the money to the debt if Moffatt with his bail were not at the office of appellant by eleven o'clock.

The judgment will therefore be reversed, with costs.

MONK, J.:—

I have no hesitation in concurring in the judgment for the reasons which have been given by my learned brother. An agreement was made by a professional gentleman of a somewhat perilous nature, but the object was to accord an unusual indulgence to Moffatt. The question is, did he (Moffatt) comply with the terms of the agreement? I am unable, after a careful consideration of the evidence, to arrive at the conclusion that there was a substantial compliance with the agreement, and therefore I concur in reversing the judgment of the Court below.

The judgment of the Court below is as follows:—

"The Court, etc.

"Considering that plaintiff, now respondent, hath not proved the material allegations of his declaration in this cause, and more especially he hath not proved that he fairly, legally and substantially fulfilled and complied with the agreement relied upon by the appellants, defendants below, in their pleas, upon which the cheque in question in this cause was left with them by him at their office for the purpose of giving bail in a *capias* case taken against said respondent, as agreed upon, by eleven

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o'clock on the 12th day of June last, for that purpose, and especially that the respondent presented himself with his bondsmen at the office of the appellants on said day, at eleven o'clock, as by said agreement he had promised to do, and therefore, that in the judgment appealed from, to wit, the judgment rendered by the Superior Court, at Montreal, on the 29th of December, 1883, there is error;

"Doth reverse the said judgment, and proceeding to render the judgment which the said Court ought to have rendered, doth dismiss the action of the said respondent (plaintiff below) with costs as well in the Court below as in the Court here." (*Diss.* Dorion, C.J., and Cross, J.)

Judgment reversed.

Trenholme, Taylor & Dickson for appellants.

Doutre, Joseph & Dandurand for respondent.

(J. K.)

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15 septembre 1885.

Coram DORION, J.C., MONK, RAMSAY, CROSS, JJ.

COURSOL ET AL.,
(*Demandeurs en Cour Inférieure*),
APPELANTS;

ET

LES SYNDICS DE LA PAROISSE DE STE. CUNÉGONDE,
(*Défendeurs en Cour Inférieure*),
INTIMÉS.

Audition par privilége—Procédés sommaires—Evocation.

JUGÉ:—Qu'un appel d'un jugement de la Cour Supérieure décidant préalablement de la validité d'une évocation de la Cour de Circuit à la Cour Supérieure, peut être entendu par privilége, la règle étant que toute cause qui doit être jugée sommairement en Cour Supérieure, peut l'être également en appel.

Les intimés poursuivirent les appelants en Cour de Circuit pour $265.16 cts., pour le premier paiement d'une

répartition imposée pour la construction d'une église dans la paroisse Ste. Cunégonde.

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Avant de plaider, les défendeurs évoquèrent la cause à la Cour Supérieure en vertu de l'article 1058 du Code de Procédure Civile.

En vertu du même article, la Cour Supérieure (Mathieu, J.) décida qu'il n'y avait pas lieu à évoquer cette cause, et ordonna que le dossier fut renvoyé à la Cour de Circuit. Ce jugement fut porté en appel par les défendeurs.

Les intimés firent une application verbale demandant à être entendu par privilége. Ils invoquaient le dit article 1058 du C.P.C. qui dit qu'après que le dossier aura été transmis à la Cour Supérieure, celle-ci "décide *sommairement* de la validité de l'évocation."

DORION, J.C., [après avoir récité les faits] :—

La règle que nous avons suivie, c'est que, ce qui doit être jugé sommairement en Cour Supérieure, peut l'être également devant cette cour. Or, l'article 1058 du Code de Procédure Civile, dit que la Cour Supérieure devra décider sommairement de la validité de l'évocation d'une cause de la Cour de Circuit. Les intimés ont donc le droit d'être entendus par privilège. (1)

Application accordée.

Barnard & Barnard, pour les appelants.

J. J. Beauchamp, pour les intimés.

(J. J. B.)

(1) La cause ayant été entendue le 23 septembre, le jugement fut confirmé.

25 septembre 1885.

Coram SIR A. A. DORION, J.C., RAMSAY, TESSIER, CROSS & BABY, JJ.

LA CORPORATION DU SÉMINAIRE DE ST. HYACINTHE D'YAMASKA,

(*Contestante en Cour inférieure*),

APPELANTE,

ET

LA BANQUE DE ST. HYACINTHE,

(*Demanderesse et créancière colloquée en Cour inférieure*),

INTIMÉE.

Privilége du constructeur—Art. 2013 *C. C.*

JUGÉ:—1o. Qu'en vertu de l'article 2013 du Code Civil le constructeur qui a observé les formalités requises par cet article n'a de privilége que sur la plus-value donnée à l'héritage par les constructions qu'il y a faites, et qu'il n'a aucun privilége ou hypothèque sur le fonds même de l'héritage.

2o. Que l'enregistrement du procès-verbal requis par l'art. 2013 C. C. pour la préservation du dit privilége ne crée pas sur l'immeuble une hypothèque tacite en faveur du constructeur.

Appel d'un jugement rendu par la Cour Supérieure siégeant à St. Hyacinthe le 18 juin 1884, présidée par l'Hon. juge Sicotte. Les remarques de l'honorable juge en chef de la Cour d'Appel expliqueront suffisamment les faits de la cause et les prétentions des parties.

SIR A. A. DORION, J.C. :—

La Banque de St. Hyacinthe a fait vendre par le shérif un immeuble appartenant au nommé Dwane, le défendeur, qui en 1882 et 1883 avait fait ériger des bâtisses sur le terrain par un entrepreneur nommé Barbeau. Ce dernier, afin de s'assurer le privilége de constructeur tel qu'établi par l'article 2013 du Code Civil, avait fait faire une expertise le 22 décembre 1882, qui fut enregistrée le 18 janvier 1883, par laquelle l'état du terrain est constaté et sa valeur établie à $450. Le 18 décembre 1882, Dwane avait consenti une hypothèque à l'appelante pour une somme de $3000. Cette hypothèque, quoiqu'antérieure au premier procès-verbal d'expertise du constructeur Barbeau, ne fut enregistrée que le 20 janvier 1883.

Le 3 mars suivant, Dwane consentit à l'appelante une autre obligation hypothéquant le même immeuble pour $2000. Cette obligation fut enregistrée le 5 mars 1883.

Le 17 septembre 1883, Barbeau fit enregistrer une seconde expertise en date du 14 septembre, d'après laquelle il appert que les travaux faits par lui sur l'immeuble s'élevaient à une valeur de $5,400.

Par acte passé le 29 janvier 1883 et enregistré le 14 mars suivant, Barbeau a renoncé en faveur de l'appelante, jusqu'à concurrence de $2,000, à son privilége de constructeur, et le 13 avril 1883, Barbeau a transporté à l'intimée, la Banque de St. Hyacinthe, la balance du prix de son contrat, savoir $2,500, qui lui était garantie par l'expertise premièrement mentionnée. Ce dernier acte a été enregistré le 10 octobre 1883.

Le protonotaire, procédant à la distribution, a colloqué l'appelante pour le montant de $2,000 à elle transporté par Barbeau, et ensuite l'intimée pour la balance des deniers à distribuer en déduction du montant de $2,500 que Barbeau lui avait transporté.

L'appelante a contesté cette collocation, alléguant que le protonotaire aurait dû colloquer l'intimée, comme cessionnaire du privilége du constructeur, non pas sur le montant qui représente le prix de l'immeuble, mais seulement sur le montant qui représente la plus-value donnée à l'immeuble par les travaux, ainsi que le veut l'article 2013 C. C. Les conclusions de la contestation demandent qu'une ventilation ait lieu suivant la loi pour déterminer d'après ce principe la proportion à être accordée aux créanciers hypothécaires, et celle à accorder au représentant du constructeur.

L'article 2013 du Code Civil donne au constructeur un droit de préférence *seulement sur la plus-value* donnée à l'héritage par ses constructions à l'encontre du vendeur et des autres créanciers. Ces termes paraissent bien clairs, mais l'intimée prétend que l'article 2013 n'est pas constitutif de droit nouveau à cet égard ; que les anciens auteurs (dont notre Code, par un vice de rédaction, n'a pas reproduit le langage) disent tous que le privilége du cons-

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tructeur existe sur l'immeuble entier et s'étend *jusqu'à* la plus-value donnée à l'héritage par les travaux ; et que l'expression "*sur* la plus-value" de notre Code devrait être "*pour* la plus-value."

Mais ce n'est pas là ce que disent les auteurs. Il est parfaitement vrai que le privilége du constructeur est toujours réductible à la plus-value donnée à l'immeuble. Mais les droits du constructeur et ceux des créanciers hypothécaires ne peuvent jamais concourir car ils portent sur des objets différents. *Troplong* (Priv. et Hyp., Vol. I, No. 80, sur l'art. 2096) explique la doctrine très clairement :

" C'est par une véritable confusion de mots qu'on parle " de préférence entre le constructeur ou réparateur et le " vendeur ou co-partageant. Il ne peut y avoir de préfé- " rence qu'entre créanciers venant en concours sur le " même objet ; et ici la possibilité de ce concours n'existe " pas, puisque le privilége de l'ouvrier et celui du ven- " deur ou co-partageant portent sur des objets différents. " Chacun se fera donc payer sur les deniers qui lui sont " affectés par privilége, sans avoir à craindre la concur- " rence l'un de l'autre."

" Ainsi, toutes les fois qu'un créancier pour frais de " réparations se présentera à un ordre en même temps " qu'un vendeur ou co-partageant, on déterminera la va- " leur de l'immeuble à l'époque où les travaux auront été " entrepris, et cette valeur sera allouée pour le tout au " vendeur ou co-partageant. Tant pis pour eux si l'im- " meuble s'est détérioré entre les mains du détenteur."

" On estimera ensuite la plus-value que les travaux au- " ront procurée à l'immeuble et qui sera arbitrée par la " valeur de ce même immeuble au moment de l'adjudica- " tion. Et cette plus-value sera attribuée pour le total à " l'ouvrier, quelque étendue qu'elle soit, sans que le ven- " deur ou le cohéritier puisse s'en plaindre."

Il en est de même dans le cas de la collocation du privilége d'un constructeur et des créances hypothécaires. Ces dernières portant sur tout le fonds, et le privilége du constructeur ne portant que sur la plus-value donnée à ce fonds, il ne peut pas y avoir de concurrence possible. Il

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peut y avoir quelque difficulté quant à la manière de procéder à l'estimation, mais nous n'avons pas à décider cette question à présent. Nous ordonnons simplement qu'une ventilation soit faite pour déterminer la proportion du prix de vente qui représente le prix du fonds, et celle qui représente la plus-value donnée à l'immeuble par les travaux du constructeur.

Le Séminaire, comme cessionnaire du constructeur, prendra tous les deniers représentant le prix du fonds, et la Banque prendra ceux qui représentent la plus-value.

On a aussi prétendu que, en supposant que le privilége de Barbeau n'existât pas ou ne portât que sur la plus-value, il avait au moins une *hypothèque tacite* ordinaire sur la totalité de l'immeuble pour la valeur de ses travaux, déterminée d'après la plus-value qu'ils lui ont conféré. Lors de la constitution et de l'enregistrement de cette hypothèque tacite, dit l'intimée, il n'y avait aucune hypothèque ou privilége affectant l'immeuble de Dwane, et les deux obligations de l'appelante sont postérieures à celle du constructeur.

Mais notre Code est différent du Code français à cet égard. Sous notre droit le privilége n'emporte pas hypothèque. Pour créer une hypothèque il faut des formalités spéciales, et dans le cas du constructeur l'enregistrement du procès-verbal ne crée pas d'hypothèque.

Le jugement formel de la Cour est rédigé dans les termes suivants :

" Considérant qu'en vertu de l'article 2013 du Code Civil le constructeur qui a observé les formalités requises par cet article n'a de privilége que sur la plus-value donnée à l'héritage par les constructions qu'il y a faites et qu'il n'a aucun privilége ou hypothèque sur le fonds même de l'héritage ;

" Et considérant que la Corporation appelante a acquis une hypothèque sur l'héritage même remontant à la date du vingt janvier 1883, jour où elle a fait enregistrer l'obligation que lui a consenti Timothy Dwane le défendeur en cette cause pour la somme de $3,000, et qu'elle a le droit d'être colloquée sur la partie des deniers rapportés devant

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cette Cour, qui représente la valeur du fonds même de l'héritage vendu en cette cause par préférence à la Banque de St. Hyacinthe, l'intimée, qui représente le constructeur Joseph Barbeau qui lui n'avait aucun privilége ni hypothèque sur le dit héritage mais seulement sur la plus-value donnée par les constructions qu'il a faites ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour de première instance le deuxième jour de juin 1884 ;

" Cette Cour casse et annule le dit jugement du 2 juin 1884 et procédant à rendre le jugement qu'aurait dû rendre la dite Cour de première instance, maintient la contestation de l'appelante au projet de distribution et collocation préparé en cette cause, et ordonne qu'avant faire droit il soit nommé des experts sous l'autorité de la Cour Supérieure pour faire une ventilation et établir suivant le cours ordinaire de la loi quelle portion des deniers rapportés devant la dite Cour Supérieure et provenant de la vente de l'immeuble vendu sur le défendeur en cette cause représente la valeur du fonds du dit héritage et quelle proportion représente la valeur des améliorations que l'auteur de l'intimée le dit Joseph Barbeau y a faites, le tout eu égard aux valeurs respectives du fonds du dit héritage et des dites améliorations à l'époque de la vente qui en a été faite par le shérif en vertu du bref d'exécution en cette cause, si mieux n'aiment les parties convenir de telles valeurs et éviter les frais de telle expertise, pour qu'il soit ensuite procédé par la dite Cour Supérieure à distribuer les deniers attribués à l'intimée sur le projet de distribution en cette cause conformément aux droits des dites parties respectivement ;

" Et cette Cour condamne l'intimée à payer à l'appelante les dépens encourus tant sur la contestation du projet de distribution et collocation de l'intimée en cette cause que sur l'appel."

(*Dissentiente* l'Honorable M. le juge Tessier.)

Jugement infirmé.

Lacoste, Globensky, Bisaillon & Brosseau pour l'appelante.

Geoffrion, Dorion, Lafleur & Rinfret pour l'intimée.

(E. L.)

January 27, 1885.

Coram DORION, C. J., RAMSAY, CROSS, BABY, JJ.

JOHN A. PILLOW ET AL.
(*Petitioners in Court below*),
APPELLANTS;

AND

RECORDER'S COURT OF THE CITY OF MONTREAL,
(*Defendant in Court below*),

AND

THE CITY OF MONTREAL
(*Mis en cause in Court below*),

AND

THE HON. J. A. MOUSSEAU,
(*Attorney General for P. Q., Intervenant*),
RESPONDENTS.

B. N. A. Act, 1867, *Sec.* 91 *no.* 27; *Sec.* 92, *no.* 8—*Local Jurisdiction*—37 *Vic.* (*Q.*) *c.* 51, 42 *&* 43 *Vic.* (*Q.*) *c.* 53—*Municipal Institutions*—*Nuisance*—*Chimney sending out smoke in hurtful quantity.*

HELD:—That while the local legislatures have no jurisdiction to deal with an indictable misdemeanour, that being a matter of criminal law assigned exclusively to the Parliament of Canada, they have authority to legislate for the prohibition of things hurtful to public health, not matter for indictment at common law, such as factory chimneys "sending forth smoke in such quantity as to be a nuisance." The local legislatures possess this power as coming under "municipal institutions" under B. N. A. Act, S. 92, no. 8; and the fact that a term of the criminal law ("nuisance") is used in a local Act to characterize an offence within the jurisdiction of the local legislature does not make the enactment *ultra vires* when the offence is not *per se* an indictable offence under the criminal law.

The appeal was from a judgment of the Superior Court, Montreal, DOHERTY, J., August 16, 1883, in the following terms:—

"Considering that petitioners have failed to establish the material allegations of their petition, and more

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particularly the want of jurisdiction in the Recorder's Court of the City of Montreal in the premises, as by them alleged; and considering that to legislate upon the subject-matter of the Acts 37 Victoria, Chapter 51, and 42 and 43 Victoria, Chapter 53, is within the competency and jurisdiction of the Provincial Legislature, according to the distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures made by sections 91 and 92 of the B. N.A. Act respectively, and that said acts and legislation and the matter thereof are not *ultra vires* of the said Provincial Legislature, being acts passed and legislation in relation to "Municipal Institutions," and not to "Criminal Law," within the meaning and intent of said section 91;

"And considering that said legislation is not of the nature or character of Criminal Law, nor for the suppression or punishment of *crime* in the sense and intent of subdivision No. 27 of said section 91, but merely to protect the citizens of Montreal from the *res noxia*, hurt and annoyance of offences not criminal in their nature, and not within the purview and intention of said number 27 of said section 91;

"Considering, therefore, that the By Law No. 130 complained of by the Petitioners as being *ultra vires* of the *mis en cause*, the City of Montreal, is *intra vires* of the said City duly incorporated as a "municipal institution," and was legally passed in virtue of the statutes 37 and 42 and 43 Victoria of the Provincial Legislature;

"I, the undersigned Judge, do quash the writ taken in this cause, and dismiss said petition with costs."

Macmaster, Q. C., for the appellant:—

It is clear that whatever is a matter of criminal law, or a matter of criminal procedure, belongs exclusively to the legislative authority of the Parliament of Canada—that it is *included* in the Federal jurisdiction by the strongest affirmative declaration in the Statute, and that it is *excluded* from the Provincial jurisdiction by equally strong inhibitive declarations. In fact, apart from the direct statement in section 91, that Criminal law and procedure

fall exclusively under the exclusive jurisdiction of the Parliament of Canada, and the further statement that they do so fall, "*notwithstanding anything in this Act*," there is the insuperable rider in the last clause of section 91, that the subjects so enumerated (including the Criminal Law and Procedure) fall within the exclusive Legislative jurisdiction of the Parliament of Canada, *even when they might appear to relate to a merely local or private matter in the Province.* The matters charged against petitioners are that they have committed or permitted the commission of a public nuisance, and they are summoned to a trial therefor before a Municipal Court. The charge made against them is a crime in the eye of the law—a crime for which they are indictable—a crime for which they have been indicted—a crime for which they have been tried and acquitted by a jury of their countrymen, properly instructed by a judge of Her Majesty's Court of Queen's Bench. In *Reg.* v. *Lawrence* (1) it was held that a Provincial Legislature cannot legislate with respect to offences of a criminal nature, except where such legislation is required for the direct enforcement of a "law of the Province made in relation to *a matter coming within the exclusive jurisdiction.*" This would be under Sec. 92, Sub-Sec. 15. In legislating in regard to a matter within Provincial jurisdiction, *a Provincial Legislature has no power to enforce its law by provisions respecting the trial and punishment of offenders in respect* of acts which would be criminal offences at common law. Section 57 of the Liquor License Act of Ontario, R. S. O. ch. 181, by which it was provided that any person who, on any prosecution under that Act tampered with a witness, or induced, or attempted to induce any such person to absent himself, or to swear falsely, should be liable to a penalty of $50.00, was therefore held to be invalid.

The following additional authorities were cited for the appellant:—

Severn v. *The Queen*, 2 Can. Sup. Court Rep., p. 70.

(1) 43 U. C. Q. B. 164, 168.

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Russell v. *The Queen*, 7 L. R. Appeal Cases, page 829. *City of Fredericktcn* v. *The Queen*, 3 Can. Sup. Court Rep., p. 505, Overruling:—*Regina* v. *Taylor*, 1 Can. Sup. Court Rep., p. 65. *Regina* v. *Kerr et al*, 3 Legal News, p. 121. *Corporation of Three Rivers* v. *Sulte*, 5 Legal News, p. 330. *Citizens Insurance Company* v. *Parsons*, 7 L. R. Appeal cases, p. 96. *Regina* v. *Lawrence*, 43 U. C. Q. B., pp. 164 and 168. *Hodge* v. *The Queen*, 7 Legal News, p. 18. *Poulin* v. *Corporation of Quebec*, 6 Legal News, p. 214. *Sir John A. MacDonald's opinions*, Confederation Debates, pp. 30, 33, 40 and 41.

R. Roy, Q. C., for the City of Montreal:—

La prétention des appelants peut se résumer en deux mots; le statut provincial 42-3 Vict. chap. 53 est inconstitutionnel, partant le règlement fondé sur ce statut est nul et non-avenu, et la Cour du Recorder n'avait aucune juridiction dans la matière. Le raisonnement adopté par les appelants pour soutenir leur thèse est que tout nuisance constitue un crime en droit commun, que le paragraphe 27 de la § 91 de "l'Acte de l'Amérique Britannique du Nord 1867," attribuant exclusivement tout ce qui est de juridiction criminelle au Parlement fédéral, la nuisance commise par les appelants ne pouvait faire le sujet d'une législation locale, ni du règlement qui en est la suite. Il faut donc voir si l'acte reproché aux appelants constitue un crime, ou si, au contraire, c'est un simple fait que la Législature locale pouvait autoriser la municipalité à prohiber. Et d'abord remarquons que le terme *nuisance*, dont se sert l'acte provincial, n'est pas employé dans le sens technique, et n'a en soi aucun caractère. En attribuant à la Législature locale une juridiction exclusive sur "Les institutions municipales dans la province," l'acte fédéral, dans l'article 92, ne pouvait avoir d'autre intention que de conserver aux municipalités les pouvoirs dont elles étaient revêtues à cette époque là même, et qu'elles avaient alors droit d'exercer pour la protection et la sauvegarde de leurs habitants; elles demeuraient libres de promulguer tout ordonnance de la nature d'un règlement de police, tout mesure essentielle au bien être et au confort

des contribuables ; tandis que par l'article 91, l'acte constitutionnel réservait exclusivement au Parlement fédéral la compétence en matière criminelle et tout contrôle pour les crimes proprement dits, tels que le meurtre, le vol, l'incendiat, le parjure et autres offenses du même genre qui sont du domaine publique. Dans l'espèce, il ne s'agit nullement d'un crime; les appelants n'étaient accusés que d'avoir commis un acte prohibé par l'autorité locale dans l'intérêt d'une localité limitée, et d'avoir contrevenu à un simple règlement de police. Mais si l'interprétation des appelants était la véritable, si toute la matière des nuisances était irrévocablement du ressort du Parlement fédéral, que deviendraient donc les institutions municipales ? Comment ! En adoptant la définition de Russell (2 Russell on Crimes, p. 418) savoir, "nuisance, *no-*"*cumentum* or annoyance, signifies anything that worketh " hurt, inconvenience or damage, and nuisances are of " two kinds, *public* or *common* nuisances which affect the " public and are an annoyance to all the King's subjects, " and *private* nuisances, which may be defined as anything " done to the hurt or annoyance of the lands, tenements, " or hereditaments of another," l'autorité locale serait privée de tout contrôle sur la régie intérieure, elle serait impuissante à prohiber l'abattage des animaux dans ses limites, à y interdire l'exploitation d'établissements dangereux et insalubres, à sévir contre les propriétaires de terrains ou habitations qui seraient une cause de dangers pour la santé et le bien être du voisinage, puisque la définition s'applique exactement à chacun de ces faits.

J. L. Archambault for the Attorney General :—

Il est indéniable que le Parlement Fédéral ait juridiction sur les questions de nuisance en général ; c'est lui qui a le contrôle et l'administration de la justice criminelle, en sorte que les offenses qui procèdent du chef ci-dessus et qui entraînent avec elles condamnation à quelque pénalité ou à l'emprisonnement peuvent être jugées et déterminées sous l'autorité des lois de ce Parlement ; mais l'Intervenant soumet que les législatures locales ont en certains cas et notamment dans l'espèce actuelle une

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jurisdiction concurrente avec ce Parlement. Elles peuvent prohiber les établissements insalubres ou dangereux dans les limites de la Province où s'exerce leur autorité, et tout au moins soumettre ces établissements à certains règlements ou à certaines conditions d'entretien. Elles peuvent de même conférer aux différentes municipalités où sont établies des industries du genre de celles des appelants le pouvoir de se protéger d'une manière efficace contre les dangers résultant de telles industries, de même que le droit de protéger la santé et la vie des citoyens par des mesures sanitaires ou de simple prudence. L'acte Fédéral clause 92 indique sous les mots "*Institutions Municipales*," l'une des branches de l'organisation publique auxquelles les législatures provinciales permettent de légiférer sur les matières affectant les droits publics et privés des citoyens de chaque province. Son Honneur le juge Torrance en rendant le jugement de la Cour Inférieure sur le *certiorari* a dans les notes qui accompagnent ce jugement, rapporté dans le *Legal News*, vol. 6, p. 209, (année 1883) abondé dans le sens de cette interprétation de l'acte fédéral.

CROSS, J.:—

The appellants, manufacturers of nails, bolts and other like iron wares, were prosecuted before the Recorder's Court at the instance of the City of Montreal, "for that the "chimney of their manufactory in Montreal did send forth "smoke in such a quantity as to be a nuisance, the said "nuisance being then and there hurtful to public health "and safety, and did then and there neglect to abate the "said nuisance, contrary to the by-law of the City Council." Whereupon the appellants petitioned the Superior Court for and obtained a Writ of Prohibition, claiming that the City Council had no right to make such By-law; that the Recorder had no jurisdiction to try the complaint; that what constituted a nuisance was not within the power or jurisdiction of either; that it was a misdemeanor only triable before properly constituted Courts of criminal jurisdiction within the meaning of the British America Act

of 1867, and being a criminal offence was only subject to the legislation of the Parliament of Canada and not to the Legislature of the Province of Quebec, who had no jurisdiction in the matter, and could give none to the City Council or to the Recorder. That appellants had been indicted for a nuisance before the Court of Queen's Bench in connection with their said works, one of them had been acquitted and proceedings were pending against the other. They had also been prosecuted and convicted before the Recorder for an alleged previous offence, for the like cause, in connection with the same manufactory, and the proceedings had been removed by *certiorari* to the Superior Court. Wherefore they prayed that the By-law should be declared null and cancelled; that a peremptory Writ of Prohibition should issue to the Recorder, and that the Attorney-General should be made party to the proceedings.

The City of Montreal appeared and pleaded to the Petition, denying appellant's pretentions. The Attorney-General also appeared to sustain the validity of the Provincial Statute.

Copies of the proceedings alleged in the Petition were produced and admitted.

The case being heard on the merits, the judgment of the Superior Court sustained the By-law and the Provincial Statutes under which it was made, and quashed the Writ of Prohibition, from which judgment the present appeal has been taken.

It is not pretended that the By-law exceeded the authority purporting to be given by the Provincial Statutes in pursuance whereof it was made, but it is contended that these Statutes were themselves unconstitutional and *ultra vires*, assuming to deal with criminal law, in violation of enumeration 27 of sec. 91 of the British North America Act of 1867, attributing to the Dominion Parliament the criminal law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters. The first and perhaps the only question is whether in this matter the Legislature of Quebec have legislated upon a criminal offence.

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The Statute of Quebec of 1874, 37 Vic. cap. 51, sec. 123, ss. 1, 2, authorises the City Council to make By-laws for, among other things, the prevention and suppression of all nuisances; that of the same Legislature 42 & 43 Vic. cap. 53, amending the Act of 1874, sec. 34, declares that for the purpose of the Act of 1874, and of the acts amending the same and of any by-law thereunder made for the abatement of nuisances affecting public health or safety in the said city, and the punishment of persons committing or causing or permitting the same to be committed, or to exist, the several state of facts enumerated in said section, including that described in sub-sec. 9, as follows: "Any chimney (not being the chimney of a private dwel- "ling house), sending forth smoke in such quantity as to "be a nuisance," should be deemed to be nuisances hurtful to public health and safety, and liable to be dealt with in the manner to be provided by such by-law. The City Council made a By-law under the authority of these statutes, imposing a penalty on persons using chimneys sending forth smoke to the extent of the noxious quantity, and under this By-law the appellants have been prosecuted by the proceedings now complained of.

Question—Is the offence specified in these Statutes and in the By-law made in virtue of their authority a misdemeanor at common law or otherwise, and as such part of the criminal law subject to be exclusively dealt with by the Parliament of Canada?

In Russell on Crimes, Prentice's Edn. of 1877, p. 418, he says: "Nuisance, *nocumentum*, or annoyance, signifieth "anything that worketh hurt, inconvenience or damage. "And nuisances are of two kinds, *public* or *common* nuisan- "ces, which affect the public and are an annoyance to all "the King's subjects; and private nuisances which may "be defined as anything done to the hurt or annoyance of "the lands, tenements or hereditaments of another. Private "nuisances, as they are remedied only by civil proceedings, "do not come within the scope of this Treatise," that is, his Treatise on Crimes and Misdemeanors.

From this definition I conclude that the offence which has engaged the attention of the Quebec Legislature and

of the City Council in this instance, falls short of the criminal misdemeanor of common nuisance.

Anything that is hurtful or noxious may be included in the term "nuisance," and it may be hurtful to public health and safety without attaining to that degree of annoyance to all the Queen's subjects which would raise it to the degree of nuisance at common law, that is the common nuisance known to the law ; and the fact that one of the Petitioners was tried for committing a common nuisance for acts of the same kind as those in question, and was acquitted, goes to show that the offence was less than a common nuisance, and yet came within the description of that prohibited by the Provincial Statutes and the By-laws made in pursuance thereof. I think it is more reasonable to consider it included within police regulations, as incident to municipal institutions in the Province, provided for by enumeration 8 of sec. 92 of the powers assigned to the Provincial Legislatures. It may perhaps also be considered a matter of a merely local or private nature within enumeration 16 providing for public health and safety within the City of Montreal, necessitated by the establishment of numerous manufactures within its precincts. The constitution, maintenance and organisation of Provincial Courts in enumeration 14, covers it in all respects so soon as it is taken out of the category of criminal law. Perhaps the question could be met in a broader sense, that is, admitting that the act of permitting or causing a chimney to send forth smoke in such quantity as to be a nuisance amounts to the misdemeanor, which is a common nuisance by the criminal law of the land, would the Provincial Legislature be prohibited from taking measures, not to try whether a common nuisance had been committed for which the offender would be amenable by criminal prosecution, but when a certain state of facts occurred which might or might not amount to such common nuisance, would that Legislature not be entitled, always acting within their powers, to provide that such penalties would be a consequence of that state of facts, would such means adopted for the preservation of

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the health of the city or any other purpose over which their powers extended, be obnoxious to the objection of invading the attributes of the Dominion Parliament? I would have the impression that it would not, but it is unnecessary to rule this point for the decision of the present case. The offender, in such case, would not be tried for a common nuisance, but for an offence of minor magnitude, which in its nature might or might not be included in the larger offence, which minor offence would not in such case be presumed to amount to a common nuisance. I may, however, remark, that the case is fairly put by Judge Torrance in the case of *Exparte Pillow et al.*[1] where he holds that the power of the Dominion Parliament to enact a general law of nuisance as incident to its right to legislate as to its public wrongs, is not incompatible with a right in the Provincial Legislature to authorise a municipal corporation to pass a by-law against nuisances hurtful to public health, as incidental to municipal institutions. Much in accordance with this is the case of *Poulin* v. *The Corporation of Quebec*,[2] and the case of *The Corporation of Three Rivers* v. *Sulte*,[3] although in these cases it was not contended that what was prohibited could have amounted to an offence cognisable by the criminal law. Again, the city authorities, before and up to the time of Confederation, were possessed of authority to suppress nuisances, which will be seen by reference to Statutes of L. C., 36 Geo. III., cap. 9, sec. 68; also, by the charter granted to the City of Montreal in 1851, 14 and 15 Vic. cap. 128, sec. 58, and in 1860 by 23 Vic. cap. 72, sec. 10. So that what were Municipal Institutions and Municipal powers at the time of Confederation passed to the Provinces without diminution by the British North America Act of 1867. On this ground, as well as from their being in the nature of Police regulations, incident to Municipal Government, I think that the exercise of such powers as that complained of in the case now under consideration

(1) 6 Legal News, p. 209.
(2) 7 Q. L. R., p. 337.
(3) 5 Legal News, p. 330.

is within the competency of the Legislature of Quebec, consequently that there is no ground for the present appeal which must be dismissed and the judgment of the Superior Court confirmed.

RAMSAY, J:—

This case raises a constitutional question with all the embarrassments attending such questions. This time it is as to the conflict of the local power to legislate as to "Municipal Institutions in the Province," and the Federal power to legislate as to "the criminal law."

By 37 Vic., c. 51, (Q.) 1874, "An Act to revise and consolidate the Charter of the City of Montreal, and the several Acts amending the same," power was given to the Council of the said city to make by-laws "for the good rule, "peace, welfare, improvement, cleanliness, health, internal "economy and local government of the said city, and for "the prevention and suppression of all nuisances and all "acts and proceedings in the said city, obstructive of, or "opposed, or disadvantageous to the good rule, peace, wel- "fare, improvement, cleanliness, health, internal economy "or local government of the said city." Then follows a list of the powers so given in detail. In 1879 another act was passed, 42-43 Vic., c. 53, for the same purposes as the Act of 1874 and the acts amending it, as also for all by-laws made in virtue of the same, providing for the abatement of nuisances affecting public health or safety in the said city, and the punishment of persons committing, or causing, or permitting the same to be committed or to exist. It was enacted that "any chimney (not being the chimney "of a private dwelling house,) sending forth smoke in such "quantity as to be a nuisance—shall be deemed to be "nuisances (a nuisance) *hurtful to public health and safety*, and "liable to be dealt with summarily in the manner pro- "vided by said By-law; *and any person who shall commit any* "*such nuisance*, or cause or permit the same to be com- "mitted, or shall allow the same to exist, or shall neglect "or refuse to remove or abate the same, shall be liable, "under the said By-law, to the penalties imposed by sec-

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" tion 124 of the said Act, as hereinafter amended, the said " Council to have full power, in the case of a continuance " of the offence, to impose the said penalties for each and " every day that the offence shall continue."

In virtue of the powers conferred by these Statutes the City Council passed a By-law, which is in these words:—

" Sec. 3. Any chimney (not being the chimney of a " private dwelling house) sending forth smoke in such " quantity as to be a nuisance, is and shall be deemed to " be a nuisance hurtful to public health and safety, and " any person who shall commit such nuisance, or permit " the same to be committed, or shall allow the same to " exist, or shall neglect or refuse to remove or abate the " same, shall, for each offence, be liable to the penalty " provided in section 6 of this By-law."

The appellants were then prosecuted on the complaint of the City of Montreal, " For that on the fifth day of " December, instant, at the said city, the chimney of a cer- " tain manufactory, for the manufacture of cut nails, and " then occupied by you and situate in St. Patrick Street, " in the said city, did send forth smoke in such a quantity " as to be a nuisance, the said nuisance being then and " there hurtful to public health and safety, and for that " you did then and there neglect to abate the said nui- " sance: contrary to the By-law of the Council of the said " city in such case, made and provided;" and the appellants were summoned " to give your reasons why you " should not be condemned to pay the fine or to the im- " prisonment imposed for the said offence and the costs of " this suit: otherwise judgment will be given against " you by default in this action." On this complaint there was a conviction.

A writ of Prohibition was sued out to restrain the Recorder's Court from proceeding in this matter: but on hearing on the merits the Prohibition was dissolved, and the parties convicted appealed.

At the argument it was contended that the Act and the By-law were illegal, the legislature of Quebec not having authority to deal with a common nuisance as it was part

of the criminal law. There is no difference of opinion possible on the subject that criminal law is not within the powers of the local parliaments; but what is interference with the local law becomes a more delicate question. The appellants seemed to think that the use of words commonly employed in the criminal law determined the question. I am inclined to think this demands a distinction. If by the words it is attempted to give jurisdiction to punish that which is already part of the criminal law the Act would be *ultra vires*. But if the terms of the criminal law were used to characterize an offence within the jurisdiction of the local legislature it would be otherwise. For instance, if a local law declared it to be "a common nuisance" not to clear the snow away from the foot-path, the law would not by that be *ultra vires*. The power depends on the thing done, not in the words used to set it forth. Of course, the same thing might be made a crime by a Dominion law, and then, probably the local law would cease to be operative. But that is not the question here. The law says that a particular thing shall be a nuisance, and that it shall be deemed to be hurtful to public health and safety; that is not giving jurisdiction to punish a thing which the law now declares to be a common nuisance. That the By-law follows the terms of the law seems to be admitted, and no point is made that it does not. I am therefore of opinion that the Recorder had jurisdiction, and that the Prohibition should be set aside. It is of course possible that the evidence might disclose a criminal offence, and in such case it would be the duty of the Recorder to commit the offender for trial. I may, however, add that I do not think we are contradicting the principles laid down in *Regina & Lawrence*.(1) It seems to me that the difficulty in reconciling conflicting powers does not arise when dealing with criminal law, which, by its nature, is absolute. The line of demarcation of the criminal law appears to me to suffer no interference. The matter must be either criminal or civil, and the local

(1) 43 U.C. Q.B. 164, and 1 Cartwright, 742.

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legislature can no more deal with an indictable misdemeanor than with a felony. I am to confirm.

DORION, C. J.:—

There are two cases reported in the Ontario Reports in which the question was what is a criminal law, and whether an Act of the Local Legislature interfered with the criminal law. One is the case of *Reg.* v. *Boardman*, (1) where the Legislature of Ontario having passed an Act to regulate tavern and shop licenses, 32 Vic. c. 32, under the power given to them by the B.N.A. Act, 1867, sec. 92, Nos. 9, 16, it was held, that they had power under No. 15, to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise, should, on conviction, be imprisoned in the common gaol for three months; and that such enactment was not opposed to sec. 91, No. 27, by which the criminal law is assigned exclusively to the Dominion Parliament.

In another case of *Reg.* v. *Lawrence*,(2) an enactment, making it an offence to induce a witness to absent himself was held *ultra vires*, for the act was a criminal offence at common law, and within the exclusive jurisdiction of the Dominion Parliament. The distinction between these cases is easily perceived.

The Parliament of Canada has exclusive authority to legislate with reference to criminal matters. Now what is a nuisance? It is certainly on the border line of civil and criminal. It can hardly be considered a criminal offence. It is often a mode of trying a civil right. It is an offence which the local legislature has a right to deal with when it relates to property within its jurisdiction. The local legislature has power to impose fines and to imprison, when the matter falls within its jurisdiction. Before the Confederation Act, the City of Montreal possessed this power, and it was not intended to deprive municipalities of it.

(1) 30 U.C. Q.B. 553. (2) 43 U.C. Q.B. 164.

BABY, J. :—

I agree with the observations of the Chief Justice, and I am of opinion that the offence which is in question here is a matter which falls within the domain of the municipal authorities. When the offence complained of is not *per se* criminal, the municipal authorities have the right to make such regulations as are necessary for restriction and prohibition. It is difficult to draw a line between what the municipal authority may prohibit and what may be considered a nuisance. The mere leaving an obstacle in the street is, in a certain sense, a nuisance. If we came to the conclusion that the municipal authorities have no jurisdiction in a matter of this kind, what use would there be for municipal institutions ?

Judgment confirmed.

Macmaster, Hutchinson & Weir for the appellants.

R. Roy, Q.C., for the City of Montreal.

J. L. Archambault, for the Attorney General, P. Q.

(J. K.)

September 25, 1885.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

CHARLOTTE FISHER,
(*Defendant in Court below*),
APPELLANT;

AND

WILLIAM S. EVANS,
(*Plaintiff in Court below*),
RESPONDENT.

Servitude—Destination made by Proprietor—Extent of Servitude—C.C. 545, 551.

HELD :—1. As regards servitudes, the destination made by the proprietor is equivalent to a title, only when it is in writing, and the nature, the extent and the situation of the servitude are specified. C.C. 551.

2. The use and extent of a servitude are determined according to the title which constitutes it; so, where E. acquired four houses "with the "servitude of hidden drains underneath the yards," and it appeared that a drain had been constructed to conduct the sewage of the four

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houses in question as well as of the adjoining corner house, to the street drain, it was held that the deed did not give any right of servitude in the portion of the drain under the yard of the adjoining corner house, this not being mentioned in the deed, and not being included in the description given therein.

The appeal was from a judgment of the Superior Court, Montreal, JETTE, J., March 31, 1884, as follows :—

" La Cour, après avoir entendu la plaidoirie contradictoire des avocats des parties, d'abord sur la motion du demandeur, en date du 17 novembre 1883, demandant la permission de réouvrir son enquête pour produire les pièces de la procédure par lui adoptée pour mettre en cause Dame Elizabeth Nixon, femme Spence, propriétaire du terrain sur lequel la servitude réclamée doit être exercée, avoir accordé la dite demande, puis entendu les parties sur le fond du procès mu entre elles, pris connaissance de leurs écritures pour l'instruction de la cause, examiné leurs pièces et productions respectives, dûment considéré la preuve et sur tout délibéré :

" Attendu que le demandeur réclame de la défenderesse une somme de $463, à titre de dommages, à raison des faits qu'il allègue ;

1. Que le 25 janvier 1868, la défenderesse lui vendit quatre immeubles bâtis de maisons, situées sur la rue Bleury de cette ville et portant les Nos. 2, 3, 4 et 5 d'une rangée de maisons appelée "Terrace Tecumseth," bornée d'un côté par la maison No. 1 et de l'autre par la maison No. 6 de la dite rangée de maisons, avec la servitude des égouts souterrains établis en arrière des dites maisons, lesquels, à l'époque de la dite vente communiquaient avec l'égout public de la rue des Jurés en passant sous les bâtisses et par le terrain du propriétaire du dit No. 1 de la dite rangée de maisons ;

2. Que jusqu'au mois de juin 1881 le demandeur jouit paisiblement, pour l'égout de ses dits fonds, de la servitude susdite, mais qu'à cette date le nommé Spence, propriétaire du terrain No. 1, de la dite "Terrace Tecumseth," par lequel passait le canal égouttant les immeubles du demandeur, ferma et boucha tout à coup ce canal, niant et

refusant au demandeur tout droit de s'en servir pour égoutter ses dits terrains comme par le passé).

3. Que le demandeur protesta immédiatement le dit Spence, et la defenderesse, requérant du premier l'exercice de la servitude susdite et appelant le second à faire cesser ce trouble apporté à sa jouissance, mais qu'ils refusèrent de se conformer à sa demande et qu'en conséquence, le demandeur fut forcé de faire construire d'autres canaux pour égoutter ses dits terrains, ce qui lui a occasionné une dépense de $263.50 ;

4. Enfin, qu'en raison de la dite interruption des moyens d'égout des dits terrains, le demandeur a perdu dans la location de ses dites maisons, une somme de $200, lesquelles sommes le demandeur réclame de la défenderesse comme susdit ;

" Attendu que la défenderesse a contesté cette demande, par diverses exceptions, alléguant en substance :

1. Que le demandeur a possédé pendant plus de dix ans, sans trouble, les immeubles à lui vendus par la défenderesse, et qu'en conséquence, sa demande a été prescrite ;

2. Que la défenderesse avait acquis ces immeubles du shérif, avec la servitude des égouts souterrains, ce que le demandeur savait, et qu'elle ne lui a vendu que les droits qu'elle avait ainsi acquis du shérif ; et que ni le shérif, ni elle, ne sont tenus à aucune garantie, à raison des défauts cachés résultant de ces égouts ;

3. Que les canaux mentionnés par le demandeur existaient lors de la vente et que celui-ci en a pris possession et en joui depuis ; mais que la défenderesse n'a jamais déclaré qu'il y eut une servitude sur le terrain Spence pour ces égouts, en faveur du fonds du demandeur ;

4. Enfin, que la servitude existe, résultant de la destination du père de famille qui a construit ces maisons et telle qu'elle se trouve constatée par écrit au désir de la loi ; mais que c'est une servitude d'indivision ou de communauté donnant un droit égal à chaque propriétaire dans le dit égout ; et que Spence a refusé au demandeur l'exer-

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cice de son droit, c'est contre lui seul qu'il aurait dû se pourvoir et non contre la défenderesse ;

" Considérant que la stipulation contenue dans l'acte de vente du 25 janvier 1868, marqué par le demandeur doit s'interpréter par l'état des lieux, au moment de la vente et auparavant, et que l'état de jouissance des dits immeubles, lors de la dite vente démontre que la défenderesse a vendu au demandeur avec la servitude qu'il réclame ;

" Considérant que l'acte par lequel Spence a privé le demandeur de l'exercice de cette servitude constitue une éviction partielle pour laquelle il y a lieu à garantie ;

" Considérant qu'aux termes de l'article 2236, § 2 du Code Civil, la prescription contre tels recours en garantie ne commence à courir que du jour de l'éviction, et que par suite, la demande dans l'espèce, est portée en temps utile ;

" Considérant que la mention à l'acte de vente de la défenderesse au demandeur, qu'elle avait acquis les immeubles du shérif, ne saurait limiter sa responsabilité envers son acquéreur et que l'acte ne contient rien à cet effet ;

" Considérant que l'acte par lequel Spence a interrompu et arrêté l'exercice de la servitude d'égouts réclamée par le demandeur, constitue un trouble de droit contre lequel le demandeur est bien fondé à demander à la défenderesse de le garantir et à défaut de l'indemniser, et que la dite défenderesse ne saurait renvoyer le demandeur à se pourvoir contre Spence, à moins d'établir que la prétention de celui-ci est mal fondée, ce qu'elle n'a pas fait ;

" Considérant en conséquence, que les exceptions de la dite défenderesse ne sauraient faire repousser la demande ;

" Considérant enfin que la preuve établit que les travaux requis pour établir une communication des égouts des dites maisons du demandeur avec l'égout public de la rue Bleury ont coûté la somme de $263, que le demandeur est par suite bien fondé à réclamer ; mais qu'il n'a été fait aucune preuve de la part des allégués ;

" Renvoie les exceptions et défenses de la défenderesse

et en conséquence la condamne à payer au demandeur la dite somme de $263 courant, avec intérêt, etc."

J. L. Morris, for Appellant.

M. Hutchinson, for Respondent.

CROSS, J:—

About the year 1844 a terrace of houses was built facing Bleury Street, partly by one S. H. Anderson, who commenced the terrace. It was afterwards continued to Jurors Street by Alexander Fisher, who had become proprietor of the ground, including the houses built by Anderson. Fisher died and the property seems to have been divided among his children, of whom the appellant was one. She becoming possessed of the corner house adjoining Jurors Street sold it to a Mr. Brooks, who afterwards sold it to Mrs. Spence without any mention of the same being subject to a servitude. She afterwards acquired at Sheriff's sale the four adjoining houses on the ascending grade above that previously sold to Mrs Spence. The Sheriff's deed declared these houses to be conveyed with the servitude of hidden drains underneath the yards. Miss Fisher by deed of date the 25th January, 1868, sold these four houses to the respondent Evans, "with the servitude of hidden drains underneath the "yards."

It appears that in the contract and specifications for the building of the houses a common drain was provided for the sewage of the whole terrace, passing under the yards and descending for an outlet to the street further down than the lowest house, sold to Mrs. Spence. This drain received the sewage of all the houses and continued to be used for that purpose until the year 1881, when it got choked up, and Mrs. Spence refused to have it cleaned or repaired; whereupon Evans, on the 15th June, 1881, served a protest upon her and Miss Fisher, claiming, among other things, that Miss Fisher had sold him the four houses with warranty of a servitude of the use of said drain through Mrs. Spence's property, and claiming damages in default of said drain

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being opened for his use. He caused a separate discharge drain to be constructed for the use of his houses, and brought the present suit on the 27th October, 1881, for his outlay and loss of rent.

Miss Fisher by her plea set up the pretensions that she did not warrant any servitude, but in good faith sold by the same description by which she had acquired at Sheriff's sale, but that there really was a common drain built for the common advantage of all the houses, amounting to a *destination de père de famille*, Mrs. Spence had no right to close it, and Evans could have his recourse against her; he had, besides, enjoyed its use uninterruptedly for more than ten years, and his recourse, if he ever had any, was barred by prescription.

There was no doubt about the facts of the construction of the drain intended for the use and used by the whole terrace, and Evans' necessary outlay being proved, the Superior Court gave him judgment for the cost of making a new drain. Miss Fisher has appealed from this judgment.

Two principal questions come up for examination. First, should Evans' recourse have been directed against Mrs. Spence for closing the drain? If it was a servitude, she purchased free of incumbrances without any charge of servitude, and, therefore, as a general rule, should not be held liable to submit to any. The code Art. 549 has adopted the maxim of no servitude without title, derived from the Coutume de Paris, and even the *destination de père de famille* in the same way requires a writing, so that it would be difficult to establish, as against her, that there was a servitude of this drain through her property. Viewed as a piece of common property necessary for the use of all the houses, and in which each house had a kind of joint ownership, it is more plausible, and in this sense would fall within the rule of *destination de père de famille* if our law was not express as to the necessity for a writing in such case. We find in the *arrêts de Lamoignon*, Tit. 20 of servitudes, Art. 1, No. 2 :—

" Si de deux maisons et héritages voisins appartenant

" à une même personne, l'un est aliéné à quelque titre et " pour quelque cause que ce soit ou par un acte faite entre " des cohéritiers communs en biens et associés, les deux mai- " sons et héritages tombent entre les mains de personnes " différentes, la destination de l'ancien propriétaire vaut " titre, et demeureront les servitudes au même état qu'elles " étaient lorsque les choses ont été séparées sans autre titre " ou contrat, s'il n'en a été autrement convenu par la dis- " position ou partage."

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This would exactly meet the case, but unfortunately it rather shews what the law ought to be than what it was in Lamoignon's time or at the present time.

As to either title or destination being derivable from the contract to build, and specifications, it is difficult to say that this could be so, when Mrs. Spence had her house conveyed to her free of charges, and the servitude was of no utility to her, as the possessor of the lowest house, and then as a real charge it should have been registered, although the position of such a right was anomalous, inasmuch as by the statute, 23 Vic. cap. 59, sec. 17, it was provided that no adjudication of any real property by the Sheriff or in any case of forced licitation, should remove or discharge any servitude to which the property was theretofore subject; an extraordinary provision with regard to *servitudes occultes*, which has been remedied by a recent Statute of Quebec, 44 & 45 Vic. ch. 16. This exemption did not, however, extend to registration.

The natural servitude of the descent of surface water would hardly warrant a drain through a neighbor's property for sewage purposes.

If, however, the right existed from the condition of the properties, or *par destination*, Evans had his recourse against Mrs. Spence. If it did not exist and was warranted to him by his deed then he has his recourse against Miss Fisher. Was it warranted? This brings us to the second principal question, that is, whether any servitude whatever was indicated as part of the rights conveyed by Miss Fisher's deed to Evans, of date the 25th January, 1868?

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If there was no servitude declared there could be no warranty of it. Now the language of the deed was "with "servitude of hidden drains, underneath the yards." What yards? Manifestly the yards of the four houses previously conveyed, and no others; nor by any reasonable construction of language could it extend to the yard of Mrs. Spence's house, which had not been mentioned, and was not included in the description given. Suppose the language had extended it to the yard of Mrs. Spence's house, would the description have been sufficient to indicate a servitude such as the respondent has claimed to exist? I should say not. *Code Civil*, Art. 545, requires the use and extent of such servitudes to be determined according to the title which constitutes them. 551. As regards servitudes, the destination made by the proprietor is equivalent to a title, but only when it is in writing, and the nature, the extent and situation of the servitude are specified.

These are not new law. Art. 215 of the *Coutume de Paris* reads as follows: "Quand un père de famille met hors "ses mains partie de sa maison, il doit spécialement dé- "clarer quelles servitudes il retient sur l'héritage qu'il met "hors ses mains, ou quelles il constitue sur le sien. Les "faut nommément et spécialement déclarer tant pour l'en- "droit, grandeur, hauteur, mesure, qu'espèce de servitude. "Autrement toutes constitutions générales de servitudes "sans les déclarer comme dessus ne valent."

Desgodets par Goupil gives numerous examples of the necessity of specification, among which, I select one, to be found at p. 344, No. 4: "Si le propriétaire d'une maison "acquiert une autre maison joignant la sienne, et qu'il y "ait des servitudes soit devant ou après l'acquisition, s'il "vend ensuite l'une des dites maisons et ne déclare pas spé- "cialement quelles servitudes souffrira la dite maison ven- "due, elle sera déclarée libre et franche de toutes servi- "tudes, d'autant que les servitudes ont été confuses et "éteintes par la possession d'un même propriétaire de ces "deux maisons. Ainsi jugé par arrêt donné en la grande "chambre le 26 mai, 1601, dans l'espèce de deux maisons "bâties et disposées par un propriétaire, et sur lui depuis

" vendues séparément à deux différentes personnes : en sorte " que les servitudes s'éteignent quand les héritages ser- " vants et dominants viennent dans le domaine de la même " personne, et qu'elles ne sont pas établies par après pour " passer séparément en des mains étrangers."

It would seem obvious that no such indication of servitude was stated in the deed from Miss Fisher to Evans as to bind her to a warranty as contended for by the respondent.

The judgment condemning her to damages in favor of Evans must be reversed and his action dismissed.

It is unnecessary to pronounce on the question of prescription.

DORION, C. J.:—

I do not wish to express any opinion upon the question whether there is a servitude, natural or otherwise, upon Mrs. Spence's property. But it may be observed that the action here is by Evans against his vendor. He says in substance, "You sold me a servitude upon another person's property." The defendant denies this, and on reference to the deed it appears that there is no mention of a drain except under the yards of the four houses sold. If there was a servitude upon Mrs. Spence's property, the plaintiff would not have his recourse against Miss Fisher until after he had put Mrs. Spence *en demeure* by an action, which has not been done. I therefore concur in reversing the judgment.

The judgment of the Court is in the following terms:—

"The Court, etc.

" Considering that in the deed of sale referred to in the respondent's declaration, made by the appellant to the respondent, executed before James Smith, notary, on the 25th January, 1868, there is no indication or sufficient description of any servitude purporting to be then existing in favor of the property thereby conveyed, and extending to any neighbouring property, more especially to that of Elizabeth Nixon, Mrs. J. C. Spence, mentioned in respondent's declaration, nor any legal evidence to

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show that a servitude of hidden drains, or any other description of servitude, did then actually exist in favor of the property thereby conveyed, extending to or charged upon the said property of said Mrs. Spence, nor that the said deed warranted the existence of any such servitude;

"Considering that the respondent has failed to prove the allegations of his declaration, more especially the warranty which he pretends the appellant contracted in his favor by the aforesaid deed; considering that no such warranty was undertaken or has existed on the part of the appellant;

"And considering that in the judgment of the Superior Court, rendered on the 31st of March, 1884, there is error, the said Court of Our Lady the Queen, now here, doth reverse, annul, and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action of the said respondent, with costs as well of this Court as of the said Superior Court."

Judgment reversed.

J. L. Morris, attorney for the Appellant.

Macmaster, Hutchinson & Weir, attorneys for Respondent.

(J. K.)

May 26, 1885.

Coram DORION, C.J., MONK, TESSIER, CROSS, BABY, JJ.

HON. H. STARNES ES QUAL.
(*Petitioner for ratification of title under award of arbitrators*),
APPELLANT;

AND

JOHN H. R. MOLSON,
(*Proprietor expropriated, and opposant below*),
RESPONDENT.

[AND A CROSS APPEAL.]

Expropriation — Quebec Consolidated Railway Act, 1880 — *Riparian proprietor — River frontage — Valuation — Servitude.*

HELD:—1. That a proprietor, whose land extends to the beach of the River St. Lawrence, within the limits of the Harbour of Montreal, has not such a distinct and independent right of easement or servitude in the river frontage as is susceptible of being valued separately and apart from the compensation awarded for the property itself when the latter is expropriated for public purposes. The inconvenience of being excluded from easy access to the river, is merely an element to be considered by the arbitrators when estimating the indemnity to be awarded for the property expropriated.

2. That even if the riparian proprietor expropriated possessed such easement or servitude, the functions of the arbitrators would not extend to the valuation of such right, unless it were included in the notice or demand of expropriation.

The case arose upon an award under the Quebec Consolidated Railway Act of 1880. The former Q. M. O. & O. Railway was being extended along the river front from the eastern limits of the City of Montreal to the Quebec Gate Barracks Station. Mr. Molson was proprietor of the extensive property known as Molson's refinery and distillery, with a frontage of 740 feet on the river, and during 44 years had carried on extensive operations, in the course of which he had availed himself of the long river frontage. In 1881 the plans for the extension of the railway were deposited. The plans showed that the railway was laid

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along the whole river front of the Molson property, taking therefrom a strip of 25 feet, and further, that the railway was to be built to a height of eighteen feet, thus interposing an impassable barrier between respondent's land on the one hand and the river on the other. The then Minister of Railways offered $7,478.50 for the land taken, and the damage to the property by taking the strip, &c. The offer was declined; Messrs. Hutchison, Simard, and Alfred Brown were then appointed arbitrators, and finally an award of $13,487.70 was made; but this included a sum of $3,500 "to be paid to the said J. H. R. Molson for loss of river frontage, if the said J. H. R. Molson is entitled to a river frontage." Mr. Molson was prepared to accept the award if paid in full at once, but his petition to have the money paid over was resisted by the Minister of Railways, on the ground of the hypothetical form of the award and the illegality of the allowance for river frontage. An action was then instituted against the Minister of Railways, but the action was dismissed on the ground that as Minister of the Crown the defendant was not subject to the jurisdiction of the Court.

Subsequently the Minister of Railways applied for ratification of title to the lands taken, and it was on this application that the present contestation arose. The respondent asked that the award be set aside, or that all the items of the award be paid to him. In answer to this, the Minister of Railways denied the respondent's pretension as to river frontage, alleging that the St. Lawrence being a navigable river the respondent had not upon its banks any right different from those of the public in general, or any right which could give rise to indemnity.

The case came before Mr. Justice Papineau, who decided there was not sufficient cause to annul the award, but he held that the whole amount, including the item of $3,500 for river frontage, should be paid over to the respondent. It was from this judgment that the present appeal was taken.

R. Roy, Q. C., for the appellant.

R. A. Ramsay, for the respondent Molson.

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CROSS, J.:—

To carry out an extension of the Quebec, Montreal, Ottawa and Occidental Railway, from the north-east city limit to Barrack Street in the City of Montreal, authorised by the Quebec Act 44 & 45 Vic. Cap. 2, the Quebec Government, owners of that road, about the month of October, 1881, took proceedings to expropriate the different properties on the line of this extension, as shown by the plan deposited for the purpose, according to the requirements of the law.

Mr. Molson had several properties on this line, extending from St. Mary Street in front, to the wharves or Harbour Commissioners' possessions in rear, and in due course had notice of a demand in expropriation of portions of said properties in rear, extending to the ordinary high water mark of the River St. Lawrence, in other words, to the Harbour in rear, with offer of compensation for the property and damages as required under and in conformity with the Quebec Consolidated Railway Act of 1880, 43 & 44 Vic. Cap. 43.

The offer was refused and an arbitration proceeded with. Mr. Molson placed before the arbitrators a detailed statement of his claim, classifying values and damages under various distinct heads and subdivisions by numbers and letters, and concluded with the following: "The damage "to the property as a whole by the deprivation of its "frontage on the river, and on the wharves of the Harbour "of Montreal, to which river and wharves the proprietor "has by right access, and which he has ever used, and "which is an easement of great and increasing value in "the uses to which the property can be put."

The Minister of Railways objected to this pretension as being contrary to law, maintaining that the banks of the St. Lawrence belonged to the State. Mr. Molson, as owning the neighboring land, possessed no right to or over these banks, not more than any other citizen.

Mr. Molson, thereupon, objected to proceed with the arbitration, unless an award should be made upon this his third head of claim, and threatened to stop the pro-

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ceedings by injunction. The arbitrators, under the circumstances decided to take evidence on this third head of claim, and their proceedings were continued up to an award which was arrived at on the 28th April, 1882.

Certain arrangements with regard to the alteration of roofs were adjusted between the parties in the course of the proceedings, and by consent made part of the award.

This award decreed to Mr. Molson as compensation for his land, buildings and different heads of damage save for the river frontage, the sum of $9,987.70, and on the latter head added :—

" Fifthly and lastly, and a further and additional sum " of $3,500 to be paid to the said John H. R. Molson for " loss of river frontage, *if the said J. H. R. Molson is entitled* " *to a river frontage*, $3,500."

Mr. Molson, who had from the first, denied the jurisdiction of the arbitrators and the regularity of their proceedings, continued to maintain that the award was irregular and insufficient, but was willing to accept it if paid at once the whole amount, including the $3,500 for river frontage ; in other words, a favorable award as accorded with his ideas of compensation would be accepted, but otherwise would be disputed. The Minister of Railways contended that as regarded the river frontage, Mr. Molson should establish his right to it, before the Government could sanction its payment.

The Minister of Railways thereupon deposited the entire amount of the award, including the disputed item in the People's Bank. Thereupon, on the 1st of May, 1882, Mr. Molson petitioned the Court to have the entire amount of the award paid him out of the monies deposited in the People's Bank, alleging its insufficiency, but offering to accept it, if paid immediately. For reasons not very fully explained this petition was unsuccessful. Upon its withdrawal, Mr. Molson instituted a suit against the Minister of Railways and the Arbitrators, to have the award set aside. It was dismissed on an *exception déclinatoire*. Mr. Molson complains of being embarrassed and delayed by the obstacles which the Minister of Railways

interposed, but it might be retorted that the proceedings on his part were adopted with great promptness and followed up with perseverance and assiduity, and if not well founded, he should have calculated the risk of the consequences.

In the meantime the Minister of Railways had, on the 24th August, 1882, on the strength of the deposit he had made in the People's Bank, and under the authority given by sub-sec. 28 of sec. 9 of the Quebec Consolidated Railway Act of 1880, applied for and obtained a Writ of Possession, in virtue of which he became possessed of the property expropriated, and on the 12th September, 1882, he deposited for ratification in the Prothonotary's office a copy of the award together with the sum of $10,869.78, being the full amount of the award, with ample added for interest, requiring the usual notices to be issued for ratification, with the reserve and under protestation that the sum deposited to cover the damage for river frontage was deposited on the express condition that it was not to be paid to the party expropriated, until he should have established before said Court that he had a right to that part of the indemnity, that is, until he had established that he had a right to the river frontage, which the Minister of Railways thereby declared that he most formally contested.

The notices for ratification, and the petition by the Minister of Railways for that purpose contained the same reserve and declaration on his part.

To this application Mr. Molson filed an elaborate opposition, in which he re-asserted his claim to compensation for the river frontage, claiming it as an easement or servitude possessed by him in which he asserted a distinct right as of property, still alleging reasons against the validity of the award, and concluding that it might be set aside, but in the event of that not being granted him, that the whole amount of the award should be ordered to be paid him, that is the whole amount deposited to cover the award, including the estimated indemnity for the river frontage.

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By his reply, the Minister of Railways denies Mr. Molson's pretensions as to the river frontage, contending that the river being navigable and the wharves thereon were free to the public, Mr. Molson included, but that he had no special property or rights therein, and was not entitled to indemnity in the premises.

Evidence was taken at considerable length on the issues so joined, but the features of the case are not thereby much affected. The question was from the first made one of law and so remains.

By the judgment of the Superior Court, rendered on the 12th September, 1883, the contestation of the Minister of Railways was dismissed, and the conclusions of Mr. Molson adopted, awarding him all the amounts contained in the Report of the arbitrators, including the compensation for river frontage, and adding interest up to the date of the judgment to be computed from the 13th of March previously, also the costs of contestation.

From this judgment the Minister of Railways has appealed, re-asserting his pretensions as already explained, and Mr. Molson has appealed, claiming that he should be awarded additional interest on account of the embarrassment and delays interposed by the Government to the recovery of his compensation, but declaring his acquiesence in the remainder of the award.

We do not find much ground to support this pretension with regard to delay and embarrassment. It was Mr. Molson who objected to the proceedings in expropriation, denied the jurisdiction of the Quebec Government in the matter, persistently disputed the proceedings and award of the arbitrators, imposed conditions and restraints upon their proceedings in the matter of the river frontage. He contended for every possible objection he could raise to the award, but was willing, in case these failed, to take the extreme indemnity. Mr. Molson has from the first striven to secure all that could be obtained, and his pretensions have been urged with perseverance and assiduity. If delays have occurred, part at least are fairly attributable to his own proceedings. The pretension intended to be

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raised has from the first been fairly enough put forward by the Minister of Railways, that is, whether Mr. Molson had any special right, property or servitude in the river frontage, entitling him to compensation under the Railway expropriation of his property.

On the merits of this question, the advantageous position of Mr. Molson's property, as contiguous to the river, may be conceded as undoubted. Its easy and convenient access to wharves and the river may greatly enhance its value, as the proximity of a property to a market, Railway Station or other important centre of business may do, and the further a property may be removed from such centre, there may be a proportionate diminution in value, but such increase or diminution of value, and the advantages and disadvantages of being shut out or facilitated by such an alteration being made when a Railway or public work is constructed, are, when they exist, so much to be added to or deducted from the value and damages to be awarded by the arbitrators in appreciating the indemnity to be given. If they see cause for this allowance, it is an element to enhance or diminish their award, according to their discretion; but it is quite a different thing when a demand is specifically made for a separate, distinct and independent right, which appears to be the case in this instance. In the first place, the fact of its being a distinct right as a servitude would, perhaps, exclude it from the demand for expropriation. If its expropriation had not been demanded, it could not be taken into account by the arbitrators. But admit that it was to be taken into account, then still it must be a property to which the claimant has a right, of which he is in fact the proprietor. We are of opinion that Mr. Molson had not the right to river frontage as claimed by him. He was bounded by the harbour, and like any other citizen had to pass through the jurisdiction of his neighbour, the Harbour Commissioners, before he could reach the river; that it might still be a question whether the *chemin de halage*, which the public had certainly at one time a right to use along the river bank should not be taken into account in estimating

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Mr. Molson's indemnity, yet if, as he contends, it has disappeared, from the fact of its being abandoned by the Harbour Commissioners, and which we would be rather disposed to concede, yet he still had, for his neighbour, the harbour and not the river; and the inconveniences, if any, beyond the line of Mr. Molson's property, would specially concern the Harbour Commissioners. For inconveniences to his property, if any were found by the arbitrators, it was their business to award him compensation in the value of his property or in the damage occasioned to it by its partial expropriation. In this case we find that he has claimed a distinct right outside of, and over and beyond the line of his own property. That we consider he is not entitled to, and it must be denied him.

It seems to me that the law on the subject is clearly and succinctly stated, as well in Mr. Molson's own factum as in the judgment appealed from, and it seems curious that distinctly opposite inferences should be drawn from the same statement of the law. By his judgment the learned Judge states that the riparian proprietor has no greater right of property in nor servitude over the river bank than other individuals; that navigable rivers and their beaches are free for public uses: but, adds the judgment, "Mr. Molson had availed himself of his contiguity to the river, and his property was more valuable than that of a non-riparian proprietor, and it was established by the first part of the award that the arbitrators had valued the property as if it were not riparian and had no advantage of contiguity to the river, and the $3,500 latterly allowed, was for being deprived of such access." Now, the award does not say so, but states a fact of quite a different nature and bearing; it says, "for loss of river frontage, if Mr. Molson is entitled to a river frontage, and the tenor of the claim in Mr. Molson's opposition is for a right over and beyond and outside of his contiguous property, in other words, an easement or servitude on the harbour itself. He might as well claim to control the uses to which the Harbour Commissioners might devote

different portions of the harbour, for instance, pretend that his access was interfered with by the erection by them of a storehouse or office on the wharf to accommodate the shipping traffic. In fact this idea of access is one which affects citizens generally, and respecting which he can have no special complaint."

The present case is especially favorable, because it is the Government itself, (although the local Government), in so far as access to the wharves is concerned, modifying public property for public uses, that is, should it be considered that the access is in any respect changed or affected. Even had the arbitrators omitted to allow Mr. Molson for inconvenience to his property for an allowance they ought to have made, the error could not be repaired by awarding him compensation for a river frontage or anything outside of his own property. If he has chanced to mislead the arbitrators by putting forward a ground of claim to which he is not entitled, the fault is his own, and he cannot profit by it.

The judgment on the appeal of the Minister of Railways is therefore to be reversed, his contestation maintained and the item of $3,500 with the interest thereon disallowed. With regard to the extra interest on the other items allowed up to the day of judgment, as it is a matter of discretion, we do not interfere with it; but the extra interest on the cross appeal cannot be allowed, as in our judgment Mr. Molson is himself the party in the wrong.

It is doubtful whether in any such case we could allow additional interest, as there is no conclusion for it, and we have to give the judgment the Court below should have given; if we found they were wrong, we would change their judgment, but they have given the utmost interest they could give, and we cannot add anything to it on account of the delay that has occurred since: that would be assuming original jurisdiction. Mr. Molson's appeal must, therefore, be dismissed.

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The following is the judgment of the Court :–

" The Court, etc.....

" Considering that by law and the statute under which the arbitrators acted, in estimating the compensation to be awarded to the said John H. R. Molson, their functions extended no further than to award compensation for the value of the property expropriated, and the damage occasioned by its being taken for the purposes of the Railway, but did not extend to the valuation or awarding compensation for a right claimed as an easement or servitude upon the public wharves or banks of the navigable river St. Lawrence, if even the party expropriated was possessed of such right;

" Considering that it appears by the proceedings had in this matter, that the said John H. R. Molson, as well before the arbitrators as by his opposition to the ratification of award, as petitioned for by the Commissioner of Railways claimed such easement or servitude, as giving him a right of access to the river;

" Considering that by law the said John H. R. Molson has no right or title to any such easement or servitude;

" Considering that the said arbitrators have added to their award a declaration in the terms following: 'And a ' further and additional sum of $3,500 to be paid to the ' said John H. R. Molson for loss of river frontage, if the ' said John H. R. Molson is entitled to a river frontage ;'

" Considering that the said John H. R. Molson is not in law or in fact entitled to any such river frontage, and that the said arbitrators exceeded their jurisdiction in adding said declaration to their award ;

" Considering that said declaration and the part of the award which contains the same are hypothetical, irregular and illegal;

" Considering that the said John H. R. Molson has himself shown, by the titles of his predecessors, that they only acquired title in the direction of the river St. Lawrence to the beach reserve and no further, which reserve at the time included not only the river bank up to the ordinary high water mark, but also a further width

reserved by the Crown for a *chemin de halage* for the use of the public, which it is not shown ever became vested in the said John H. R. Molson or his predecessors, or that allowance was made for the same when his buildings were erected or otherwise in any manner whatsoever;

"Considering that in the judgment rendered in this matter by the Superior Court at Montreal, on the 12th day of September, 1883, there is error as well in the *dispositive* thereof, and in the amount thereby awarded to the said John H. R. Molson, as in some of the reasons given for said judgment, and that, more particularly, there is error in the said judgment in allowing the said sum of $3,500 and interest thereon to the said John H. R. Molson, and including the same in the amount ordered to be paid to him;

"But considering that the said judgment has been, to a certain extent, acquiesced in, although not as regards the said sum of $3,500 and interest thereon;

"The Court of our Lady the Queen now here, doth cancel, annul, and set aside the said judgment, in so far as it conflicts with the following order and judgment, to wit: the said Court of our Lady the Queen now here, doth adjudge and order that the contestation of the Commissioner of Railways, on behalf of Her Majesty the Queen, of the opposition of the said John H. R. Molson, be and the same is hereby maintained, and the said sum of $3,500, so mentioned as a further and additional sum to be paid to the said John H. R. Molson, in case he was entitled to a river frontage, is hereby disallowed and struck out of said judgment, together with any and all interest allowed thereon, and costs of contestation, and that the sum of $10,869.78, out of the sum deposited in the hands of the Prothonotary of the said Superior Court, be paid to the said John H. R. Molson, as compensation for the land and buildings expropriated for the said extension of Railway, and the damages caused to him by said expropriation, and that the said John H. R. Molson do pay the costs of the said contestation of said opposition and the costs of the said Commissioner of Railways on the present appeal;

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"And adjudging upon the appeal taken by the said John H. R. Molson, claiming an additional allowance of interest;

"Considering that there is no error in the said judgment as regards the said additional claim for interest, the said appeal of the said John H. R. Molson is hereby dismissed with costs;

"And this Court doth, in all other respects, confirm the said judgment of the said Superior Court."

Judgment reversed, and cross appeal dismissed.

R. Roy, Q.C., for Appellant Starnes.

R. A. Ramsay, for Respondent Molson.

(J. K.)

March 24, 1885.

Coram DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

GEORGE BURY
(*Opposant below*),
APPELLANT;

AND

JACOB L. SAMUELS
(*Contestant below*),
RESPONDENT.

Procedure—Execution—Insolvency of defendant—Opposition.

HELD:—That where a judgment creditor has caused the seizure and sale of a portion of the defendant's effects, sufficient to cover his claim as stated in the writ of execution, he cannot subsequently, upon a mere allegation that the defendant is insolvent, and that oppositions *afin de conserver* have been filed by other creditors, obtain an order for an *alias* writ of execution, for the purpose of seizing and selling the remainder of the defendant's effects.

The judgment appealed from was rendered by the Su-

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perior Court, Montreal (LORANGER, J.), Sept. 12, 1883, in the following terms:—

"La Cour, etc...

"Considérant que le demandeur a obtenu le 3 novembre 1882, jugement par défaut contre les défendeurs faisant affaires ensemble et en société sous le nom de Silberstein et Cie. pour la somme de $500 courant et les dépens;

"Considérant que le demandeur a fait saisir en exécution de ce jugement les biens meubles, marchandises et effets de commerce de la dite société Silberstein et Cie., dont l'opposant faisait partie comme susdit; mais qu'une partie seulement des effets saisis ont été vendus, le produit de la vente ayant été suffisant pour satisfaire au montant porté au dit bref;

"Considérant que deux oppositions afin de conserver ont été produites sur les deniers ainsi prélevés, l'une par les nommés Franck et l'autre par la compagnie dite 'The Corriveau Silk Company,' tous deux créanciers de la dite société Silberstein & Cie.; que par leurs dites oppositions, les dits opposants ont allégué que la dite société Silberstein & Cie. était insolvable et ont demandé à être admis à la distribution de la dite somme ainsi prélevée au marc la livre avec le demandeur et les autres créanciers des défendeurs;

"Considérant que le demandeur a subséquemment à la production des dites oppositions afin de conserver, savoir, le 29 décembre dernier, obtenu de l'un des honorables juges de cette cour, permission de faire émaner un alias bref pour faire vendre la partie des biens et effets saisis comme susdit, qui n'avaient pas été vendus, pour les raisons ci-dessus mentionnées;

"Considérant que l'opposant, un des défendeurs membre de la dite société Silberstein & Cie., s'est opposé à l'exécution de ce dernier bref pour les raisons suivantes:

1o. Parce que l'ordre du juge qui en avait permis l'émanation, est illégal et irrégulier en autant que nul avis préalable de la présentation de la requête sur laquelle le dit ordre a été accordé, n'a été donné aux défendeurs, et qu'en

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outre le dit ordre avait été obtenu sous de fausses représentations.

2o. Parce que le premier bref en vertu duquel les biens et effets des défendeurs ont été vendus, ayant été satisfait, le demandeur était sans droit à demander l'émanation de l'*alias* bref;

3o. Parce que la société Silberstein & Cie. était solvable à l'époque de l'émanation du premier bref d'exécution et lors de la production des oppositions afin de conserver;

4o. Que l'allégation d'insolvabilité, contenue dans les dites oppositions était fausse et avait été faite frauduleusement et par entente entre le demandeur, les dits opposants et le défendeur Silberstein, associé de l'opposant, dans le but de faire cesser le commerce de la dite société et d'en éliminer l'opposant au profit du dit Silberstein;

"Considérant que le demandeur n'était pas tenu de donner aux défendeurs avis préalable de la demande qu'il a faite le 29 décembre dernier pour l'émanation de l'*alias* bref, et qu'il n'existe aucune preuve que le dit ordre ait été obtenu frauduleusement de la part du demandeur ou sur de fausses représentations; mais qu'au contraire, s'appuyant sur les allégations contenues dans les dites oppositions, le demandeur qui se voyait appelé à partager au marc la livre et exposé à être retardé dans le recouvrement de sa créance, était fondé à demander qu'il lui fût permis de faire vendre les biens saisis en vertu du premier bref, pour en faire distribuer le prix le plus tôt possible entre lui et les autres créanciers de la dite société Silberstein & Cie;

"Considérant en outre qu'il n'y a pas lieu à rescinder le dit ordre du 29 décembre dernier, sur la contestation telle que liée entre les parties, l'opposant n'ayant point demandé par son opposition la rescision du dit ordre;

"Considérant qu'il est en preuve que la société Silberstein & Cie. était insolvable lors de la production des dites oppositions afin de conserver; que le fait est admis par l'un des associés, savoir, le défendeur Adolphe Silberstein, et que sur ce point son témoignage est irrécusable;

"Que le 12 décembre, la dite société Silberstein & Cie.

a fait une cession de ses biens entre les mains du nommé M M. Duff pour le bénéfice commun de ses créanciers;

"Que cet acte de cession signé par l'un des associés pour la société, est valable et doit être reconnu comme tel sur la présente contestation, le dit acte n'ayant point été déclaré nul par aucune cour de justice et l'opposant ne demandant pas lui-même par son opposition la nullité du dit acte;

"Considérant que l'opposant n'a fait aucune preuve des allégations de fraude que contient sa dite opposition, ni de la participation du demandeur dans le complot qui aurait été tramé entre le défendeur Silberstein et les opposants afin de conserver, pour faire cesser les opérations de la société Silberstein & Cie. en mettant ses biens sous liquidation au moyen des dites oppositions afin de conserver;

"Considérant, que sous les circonstances et vu les dites oppositions afin de conserver, lesquelles sont contestées par le défendeur et sont encore pendantes;

"Vu en outre que le montant des dites oppositions est plus élevé que le montant du jugement du demandeur, il n'y a pas lieu de déclarer que la créance du demandeur a été éteinte et payée par le prélèvement fait sur le premier bref d'exécution en cette cause;

"Que la prétention de l'opposant, savoir, que le demandeur est obligé d'attendre que le jugement soit rendu sur les dites oppositions afin de conserver, avant d'être admis à procéder à la vente des biens et effets des dits défendeurs, est inadmissible en loi;

"Considérant que l'opposant n'a point prouvé les allégués de son opposition, et qu'il n'y a pas lieu d'adjuger sur les moyens de forme ou les irrégularités et insuffisance de la procédure que l'opposant a signalées à l'audience;

"Attendu que ces moyens n'ont pas été invoqués sur la contestation telle que liée entre les parties;

"La cour renvoie la dite opposition avec dépens distraits à M. G. Joseph, avocat du demandeur."

E. Barnard, Q.C., for the appellant.

J. Bates, for the respondent.

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The point decided appears fully in the remarks of the learned judges.

RAMSAY, J. (*diss.*) :—

The respondent was creditor of the commercial firm of Silberstein & Co., of which appellant was a partner, for the balance of $500 due on the promissory note of the said firm. The respondent sued the firm and obtained judgment by default. In execution of this judgment the goods of the firm were seized, and a portion of them having produced $542, the sale was stopped, and the money returned into court. Immediately two oppositions setting up the insolvency of Silberstein & Co., were filed, claiming together $852.02. Seeing this, the respondent applied to a judge in chambers for an order to permit him to take out an *alias* writ of execution, which was granted. The appellant Bury, one of the partners of Silberstein & Co., moved the court to set aside the order in chambers. This application was rejected and he appealed. He contends that there is nothing to show that Silberstein & Co. are insolvent, or that the oppositions are well founded, and consequently that it may be that respondent's judgment is satisfied.

It seems to me that this appeal should offer no kind of difficulty. The familiar rule of our law, that the property of the debtor is the *gage* of the creditor, covers the whole ground. The execution is fruitless to the creditor, and he therefore demands the privilege of having the whole of his debtor's goods sold and the proceeds brought before the court. The debtor pretends he is not insolvent, but all the presumptions are the other way. Here we have a commercial firm allowing judgment to go by default in an action on its own promissory note; then execution follows and the money is at once absorbed by oppositions. I can understand a partner coming forward to say that, although appearances are against him, he is solvent, that he does not owe the money claimed by the oppositions, and to ask that the sale on the *alias* writ may be suspended. But that is not Bury's posi-

tion; he says, there is no text of law to authorize the judge to give the order he did, and of which he had no notice. It will hardly be contended that the absence of notice alters the question, for he (Bury) was heard in the Superior Court, and he did not show that he had suffered by any surprise. As to the main point, I know no text of the law which forbids such a procedure, and it is necessary to stop summarily the repetition of a very old fashioned fraud, which the appellant has taken no pains to conceal. I am to confirm.

BABY, J., also dissented.

DORION, C. J.:—

L'intimé ayant obtenu un jugement contre Silberstein & Cie., pour une somme de $500, a fait saisir et vendre les meubles des défendeurs jusqu'à concurrence du montant de sa créance. Deux oppositions afin de conserver ont été faites par des créanciers de Silberstein & Cie., qui demandaient à être colloqués au marc la livre, alléguant l'insolvabilité de leurs débiteurs. Ces oppositions furent rapportées en même temps que les deniers prélevés sur la vente des effets à la poursuite de l'intimé.

Ce dernier, sans attendre la distribution des deniers, a présenté à un juge en chambre une requête demandant qu'il lui fût permis de faire émaner un *alias* bref d'exécution, pour faire saisir et vendre ceux des meubles des défendeurs qui n'avaient pas encore été vendus. Il alléguait, dans cette requête, la première vente, les oppositions conservatoires et que les défendeurs étaient insolvables. Il lui fut permis de faire émettre un nouveau bref d'exécution, et Bury, l'appelant, et l'un des défendeurs en cette cause, a fait une opposition demandant la nullité de la nouvelle saisie. Son opposition a été renvoyée, et il appelle du jugement de la cour de première instance.

En vertu de l'art. 595 du Code de Procédure Civile, il ne peut être procédé à la vente des effets saisis que jusqu'à concurrence de ce qui est nécessaire pour le paiement de la créance du créancier saisissant.

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Il faut remarquer que le second bref d'exécution a été émis sur une requête qui n'a pas été communiquée aux défendeurs, et nous ne trouvons rien, dans le Code de Procédure Civile, qui puisse autoriser un juge à faire émettre un second bref d'exécution avant la distribution des deniers prélevés sur un premier bref, lorsque ces deniers suffisent pour acquitter la dette.

Il est vrai qu'ici il a été allégué que les défendeurs étaient insolvables, mais il n'y a encore eu aucune contestation des oppositions ci-dessus, ni aucune preuve à cet effet, et il est possible que ces oppositions soient, après tout, rejetées comme n'étant pas fondées et que l'intimé soit payé en entier à même les deniers prélevés par la première vente. Tout au plus, si l'intimé avait allégué des faits qui, avant le jugement, auraient justifié l'émanation d'une saisie-arrêt, il aurait pu obtenir un ordre pour faire saisir-arrêter les effets jusqu'à la distribution des deniers déjà prélevés, comme cela se pratique en vertu de l'article 551 C. P. C., lorsque dans les quinze jours du jugement le défendeur dissipe ses effets. Même dans ce cas, il n'est pas permis au créancier de faire saisir et vendre, mais seulement de saisir les effets, et la vente ne peut avoir lieu que dans les quinze jours que la loi accorde au débiteur.

Le second bref étant émané sans droit, l'opposition de l'appelant doit être maintenue.

MONK, J.:—

I concur in the judgment, and after the observations which have fallen from the Chief Justice it is scarcely necessary for me to add anything to what has been said. But there is a slight difference between my opinion and that of the Chief Justice. An execution issued, and enough was sold to provide for the payment of the debt, interest and costs. Immediately upon the return of this writ, two oppositions on the monies were filed, the defendant being alleged to be insolvent, and it was asked that the amount be distributed *au marc la livre*. Before any proof was adduced on the question of insolvency, an application was

made to the judge in chambers to have an *alias fi.fa.* for further levy. This order was obtained *ex parte*, it being alleged merely that the defendant was insolvent, and that Bury would not be paid unless there was a further sale. Even supposing it had been proved that there was insolvency it is very doubtful whether an *alias* writ could legally issue. But in this case there was no proof whatever of insolvency, and until that proof is made, I think the issue of an *alias* writ of *fi.fa.* was inoperative. Upon this ground, I think the order given in chambers was illegal. If such a practice were sanctioned, it would involve a very serious innovation in our jurisprudence. The sale would proceed, and all the defendant's property would be sold. Then, suppose the allegations of the opposition were utterly unfounded, what would be the defendant's position? His property would be gone, for a debt of say $500, and perhaps there would have been levied $9,500 more than he owed. I cannot understand how the judge in chambers could have given such an order without some proof that the allegation of insolvency was well founded. I have never heard of such a proceeding before.

The judgment is registered as follows:—

"Considérant qu'en vertu de l'article 595 du C. P. C. du B.-C., il ne peut être procédé à la vente des meubles et effets mobiliers saisis en vertu d'un bref d'exécution, que jusqu'à concurrence de ce qui est nécessaire pour le paiement de la créance du créancier saisissant, tel que portée au bref d'exécution en capital, intérêt et frais;

"Et considérant qu'après le prélèvement sur un premier bref d'exécution de deniers suffisants pour payer la créance de l'intimé, et le rapport de ces deniers devant la cour, mais avant qu'ils ne fussent distribués, l'intimé, sans avis préalable aux défendeurs, et sur la représentation que deux oppositions afin de conserver alléguant l'insolvabilité des défendeurs avaient été produites et qu'il était exposé à perdre sa créance, aurait obtenu d'un juge en chambre l'autorisation de faire émettre un *alias* bref

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d'exécution pour saisir et vendre les meubles des défendeurs qui n'avaient pas été vendus sur la première saisie ;

"Et considérant que, ni le Code de Procédure ni aucune autre loi en force en cette province ne peuvent justifier l'autorisation ainsi donnée, et qu'après le rapport en cour des deniers prélevés sur le premier bref d'exécution, la créance de l'intimé était devenue indéterminée, d'autant plus qu'il n'y avait aucune preuve que les défendeurs fussent insolvables ;

"Et considérant qu'il n'était pas nécessaire de demander à ce que cette autorisation, qui est entachée d'une nullité radicale, fût déclarée nulle ;

"Et considérant que l'appelant, qui est un des défendeurs, a intérêt à ce qu'il ne soit pas procédé à la vente des meubles saisis en cette cause pour plus que le montant de la créance de l'intimé, qui ne peut être déterminée qu'après la distribution des deniers déjà prélevés sur le premier bref d'exécution, et qu'en vertu, tant de l'art. 581 que de l'art. 595 du C. P. C., l'appelant est bien fondé dans son opposition à la saisie et vente des meubles et effets saisis à la poursuite de l'intimé, en vertu du dit *alias* bref d'exécution ;

"Et considérant qu'il y a erreur dans le jugement rendu par la cour de première instance, savoir, le jugement rendu par la Cour Supérieure siégeant à Montréal le 12e jour de septembre 1883, qui a renvoyé cette opposition ;

"La cour casse et annule le dit jugement du 12 septembre 1883 ; et procédant à rendre le jugement qu'aurait dû rendre la cour de première instance, déclare la dite opposition de l'appelant bien fondée, et casse et annule la saisie faite en vertu du dit *alias* bref d'exécution des meubles et effets des défendeurs, et condamne l'intimé à payer à l'appelant les frais encourus sur la dite opposition, tant en cour de première instance que sur cet appel. (*Diss.* Ramsay et Baby, JJ.)"

Judgment reversed.

Barnard & Barnard for appellant.

G. Joseph for respondent.

(J. K.)

April 2, 1885.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, JJ.

JAMES LORD ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

THOMAS H. DAVISON,
(*Plaintiff in Court below*),
RESPONDENT.

[AND A CROSS APPEAL.]

Ship—Charter-party—Demurrage—Dead Freight.

The charter-party provided that the ship was to be loaded "as fast as can "be received in fine weather, and ten days' demurrage over and above "the said lying days, at forty pounds per day. The ship to have an "absolute lien on the cargo for all freight, dead freight, and demurr- "age due under this charter-party, but charterers' responsibility to "cease upon shipment of the cargo, provided the cargo be worth the "freight, demurrage, &c., on arrival at the port of discharge. Should "ice set in during loading so as to endanger the ship, master to be at "liberty to sail with part cargo and to have leave to fill up at any "open port on the way homeward for ship's benefit."

HELD (CROSS, J., *diss.*):—That notwithstanding the clause as to ship having leave to fill up at other ports on the homeward voyage, the shipowner was entitled to dead freight owing to the setting in of ice having occasioned the departure of the vessel before the loading was completed, the completion of the loading having been prevented by the fault of the charterer.

The appeal was from a judgment of the Superior Court, Montreal, LORANGER, J., November 4, 1882, maintaining in part the respondent's action. The judgment was in the following terms:—

"La Cour, etc.....

"Considérant que par charte-partie signée à Montréal, le 25 octobre 1880, les défendeurs ont affrété le vaisseau "Whickham," propriété du demandeur, pour transporter du port de Montréal dans un port du Royaume-Uni ou aucun autre port sur le continent entre le Hâvre et Am-

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sterdam, des grains de diverses espèces à des prix et conditions mentionnées dans ce contrat ;

" Attendu que par ce contrat il a été convenu que les défendeurs feraient le déchargement du dit vaisseau, aussitôt et aussi vite qu'il serait prêt à le recevoir ;

" Attendu que le dit bâteau le " Whickham" est arrivé dans le port de Montréal le 8me jour de novembre 1880, et qu'avis a été donné aux défendeurs de son arrivée ; que de ce jour, les défendeurs étaient tenus de se mettre en demeure de commencer le chargement de ce vaisseau sur premier avis, vu l'avancement de la saison et conformément aux termes de leur contrat avec le demandeur ;

" Attendu que le 15 novembre le dit vaisseau le "Whickham" était prêt à recevoir le chargement des défendeurs, que les défendeurs en ont reçu l'avis avec les certificats requis par la loi et la coutume du port de Montréal, avant midi de ce même jour, mais qu'ils ont négligé, sans cause ni raison de commencer le chargement du dit vaisseau ce jour-là et qu'ils n'ont en réalité commencé que le lendemain, à une heure de l'après-midi, le chargement du dit vaisseau ; qu'ils ne l'ont continué que jusqu'à cinq heures du même jour, faisant ainsi perdre dix heures de travail ordinaire au demandeur durant les dites journées du 15 et du 16 novembre ;

" Considérant que le 17 novembre, le capitaine du vaisseau le " Whickham" était justifiable d'arrêter le chargement du dit vaisseau, vu que, par le fait des défendeurs, la sûreté du vaisseau devenait compromise, et que les heures de travail de deux à six heures, ce jour-là, ont été perdus par le fait des défendeurs ;

" Considérant que le 18 novembre, les défendeurs n'ont point travaillé au chargement du vaisseau, malgré qu'il soit prouvé que ce jour-là, ils auraient pu le faire, s'ils avaient eu la cargaison nécessaire, sans exposer le vaisseau ou la cargaison ;

" Considérant que, malgré que les défendeurs paraissent avoir mis toute la diligence nécessaire pour le chargement du dit vaisseau, à partir du vendredi, le 19 novembre jusqu'au 21, date de son départ, cependant ils doivent être

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tenus responsables des retards éprouvés jusqu'au dit jour, 19 novembre ; que le travail de nuit qu'ils ont pu faire pour le chargement du dit vaisseau, après l'expiration du temps requis et raisonnable pour tel chargement, n'est pas une excuse valable pour les exonérer des retards encourus jusque-là ; que malgré que les défendeurs ne fussent obligés par le contrat ni par les coutumes du port de Montréal, de faire ce chargement en dehors des heures de travail ordinaire, ils ont dû, dans les circonstances le faire dans leur intérêt personnel et non dans l'intérêt du demandeur qui était suffisamment protégé contre la négligence des défendeurs par les termes de son contrat ;

"Considérant que, par la faute et la négligence des défendeurs, le dit vaisseau le "Whickham" n'avait pas reçu le 20 novembre le chargement qu'il pouvait contenir, qu'il était encore prêt à recevoir 214½ tonnes de chargement, mais que ce jour-là il dut quitter le port de Montréal sans pouvoir completer son chargement, vu l'état avancé de la saison ; que par les termes du dit contrat, le demandeur était autorisé à quitter le dit port et à faire payer aux défendeurs, au prix du dit contrat, telle quantité de la cargaison qui n'avait pas été déposée à bord du dit vaisseau, par la faute ou négligence des défendeurs ;

"Considérant qu'aux termes du dit contrat la somme de £313 sterling, égale à la somme de $1,523.20 cours du Canada, réclamée par le demandeur comme inexécution de la convention des défendeurs est légitimement due ;

"La Cour condamne les défendeurs conjointement et solidairement à payer au demandeur la dite somme de £313, cours d'Angleterre, égale à celle de $1,523.20, cours du Canada, avec intérêt, etc."

W. H. Kerr, Q. C., for the appellant on the principal appeal :—

Four questions present themselves for the consideration of this honorable Court :

1. Whether under the Charter Party any claim whatsoever for dead freight can be made as against the appellants, owing to the clauses of the ship having an absolute lien for all freight, dead freight and demurrage due under

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the Charter Party, and of the charterers' responsibility to cease upon shipment of the cargo, provided the cargo be worth the freight, dead freight, demurrage, &c., at the port of discharge.

2. Whether although the cargo was to be loaded as fast as can be received in fine weather—the appellants did not perform more than they were required to do under the said Charter Party, by working at night and in bad weather, in order to give the ship dispatch.

3. Whether the clause "Should ice set in during loading, so as to endanger the ship, master to be at liberty "to sail with part cargo and to have leave to fill up at "any open port on the way homeward for the ship's benefit," did not show the intention of the parties, that, if the vessel was so prevented from being loaded and left with part cargo, it was the duty of the master to fill up at some other port for the ship's benefit, and thereby make up for any dead freight which the speedy departure of the ship might have necessitated.

4. Whether under all the circumstances of the case the appellants were not entitled to the dismissal of the action.

1. The claim made by the respondent in this case is for dead freight, the ship not having loaded up to her full capacity; and the amount of the freight short, as it is pretended, was equal to the sum of £313 sterling, being the freight upon 214½ tons of cargo, failed to be shipped at 6s. 3d. per each quarter of wheat.

For the delays in loading the respondent claimed the sum of £100 sterling.

There can be no doubt that the claim for the freight of 214½ tons, is for dead freight, consequently since the vessel had sailed, it being expressly stipulated in the Charter Party, that the appellants' responsibility for dead freight should cease upon the shipment of the cargo, provided the cargo be worth the freight, &c., on arrival at the port of discharge, and as it is not attempted to deny that the cargo was worth more than the freight, &c., at the port of discharge, the charterers', to wit, the appellants' liability had ceased, as soon as the vessel started from the city

of Montreal, inasmuch as she was started while being loaded.

The authorities upon this point are clear :—*French et al.* v. *Gerber et al.*, L. R. 1 C. P. D. 737; *Ibid*, L. R. 2 C. P. D. 247; *Kish* v. *Corey*, L. R. 10 Q. B. 553; Foard, Mer. Shipping, pp. 454, 455; McLachlan on Shipping, pp. 356-358; 2 Maude and Pollock, 4 Ed. pp. 412, 413.

2. (Question of evidence.)

3. With respect to the 3rd point, the appellant submits that the meaning of the words in the Charter Party as to the vessel leaving on account of ice with part cargo, is that the appellants should be discharged from all responsibility for dead freight. The Captain was obliged to fill up for the ship's benefit at some other port, which it is not shown that he did, and which virtually he did not attempt to do.

It is also submitted that the effect of the clause in the Charter Party, that 10 days' demurrage should be allowed over and above lying days at the rate of £40 a day—even if the Court should be against appellants upon the other grounds hereinbefore alleged — covers the whole of the respondent's claim, and if by any means the vessel were retarded and not loaded as fast as could be done in fine weather for any delay over and above such time, the appellants would only be obliged to pay £40 per day.

H. Abbott, for the respondent on the principal appeal, contended for the dismissal of the appeal :

1. Because the appellants were bound to load the vessel as fast as possible in fine weather, and no lying days were allowed for loading.

2. Because they had ample notice of the arrival of the vessel, and should have been prepared with sufficient cargo to begin the loading at mid-day on the 15th of November, and carry it on continuously and speedily thereafter.

3. Because the appellants failed to supply any cargo until mid-day on the 16th of November, and then an insufficient quantity; and failed to furnish wheat until the 19th, thereby delaying the vessel two days and a half.

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4. Because the appellants were guilty of negligence and want of diligence throughout in the loading of the whole vessel.

5. Because the master of the vessel was justified in leaving the port of Montreal at the time he did under the terms of the charter-party, and the appellants are responsible for the shortage in the cargo which existed when the vessel left.

CROSS, J. (*diss.*) :—

This action was brought by the owner of the steamship Whickham against the charterers, to recover £100 stg. for demurrage and £313 for dead freight, on a voyage for which the vessel was chartered from the Port of Montreal to a port in Europe to be indicated by the charterers. The Superior Court gave the ship-owner judgment for the dead freight, but denied his right to demurrage. Both parties have appealed.

The charter was dated at Montreal, 30th October, 1880, the ship, of the capacity of 1124 tons, being then on its way from Barrow in England to the Port of Montreal. The material provisions of the charter were that the ship should proceed to Montreal and there load a full and complete cargo of grain, or in part flour, at rates specified in the charter for the different kinds of grain or flour that might be loaded, and being so loaded should therewith proceed to a safe port in the United Kingdom or a safe port on the Continent, calling at certain ports indicated, for orders, and to deliver her cargo at the port indicated.

Ten running days to be allowed the merchant charterer for discharging, commencing from the time of ship being ready to deliver cargo.

Ship to be loaded as fast as can be received in fine weather, and ten days on demurrage over and above the said *lying days* at forty pounds per day.

The ship to have absolute lien on the cargo for all freight, dead freight, and demurrage due under this charter party, but charterers' responsibility to cease upon

shipment, if the cargo be worth the freight, demurrage, &c., on the arrival at the port of discharge.

Should ice set in during loading so as to endanger the ship, the master to be at liberty to sail with part cargo and to have leave to fill up at any open port on the way homeward for ship's benefit.

The steamer arrived at the port of Montreal on the 8th Nov., 1880, and before noon on the 15th Nov. was ready to receive cargo, whereof notice was given to the shippers, accompanied by the necessary certificate of the Port-warden. She received cargo up to the morning of the 21st, when she left, having previously, on the 20th, by a note from the captain, intimated to the charterers that on account of the threatening state of the weather and ice beginning to set in, he had decided, for the safety of his vessel, to start the following morning, the 21st Nov., thus availing himself of the privilege reserved in the charter, to sail with part cargo in case of anticipated danger from ice forming.

On the 16th Nov. the master of the steamer had a protest served on the charterers, in which it was asserted that the lay days commenced at noon on the 15th; he complained that no cargo had yet been shipped up to noon on the 16th and protested for damage, demurrage, &c. A like protest was served on the 18th, complaining of insufficient diligence, but admitting that there was half a day of unsuitable weather for loading.

The charterers defended themselves, alleging that by the custom of the port they were not bound to commence loading until noon on the 16th, nor at night, nor in bad weather, nor on Sundays; that they did extra diligence, working at night and in part of the bad weather and part of Sunday, but were interrupted by the master refusing to proceed on the afternoon of the 17th, from apprehended danger to his vessel loading too much into the forehold without a counterbalance in the other parts of the vessel, and by the fault of the master in not procuring a sufficient number of baggers to receive the grain into bags and have them prepared by sewing, to be stowed

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away; that their extra diligence more than made up for any pretended loss of time.

The proof made as regards diligence is contradictory, but, on the whole, leaves the impression that by the fault of the shippers the vessel may have been delayed two days, at most, assuming that the shippers should have been ready at noon on the 15th.

When the vessel left there was grain alongside sufficient to complete her cargo.

It is satisfactorily established that ice was forming so as to endanger the vessel, and that she left at the very latest time she could have remained with safety.

No serious question arises as to the quantum of dead freight claimed, if it is to be allowed.

The judgment of the Superior Court appealed from allows the dead freight in full, but refuses the demurrage or damages for delay in loading.

As I read the charter, the demurrage was expressly appended to the clause providing for the loading of the vessel as fast as could be received in fine weather, and so intimately connected with it, that the two cannot be separated in the construction, and the ten days here given are in addition to the ten running days to discharge. "As "fast as can be received in fine weather," was inserted for the benefit of the ship as much as that of the shipper, it admits of a measure as to time, and in this respect differs from the clause in question in the case of *Lockhart* v. *Falk*, 10 L. R. Exch. 132, relied on by the ship, where the provision was to load in the customary manner, language giving no indication of a measure of delay, besides the ship is estopped from maintaining that there are no lay days at the port of loading, because in his protest of the 16th Nov. the captain expressly declared that lay days commenced at noon on the 15th Nov.; and in the protest of the 18th he declared that the vessel was to be loaded as fast as could be received in fine weather; and demurrage was stipulated at the rate of forty pounds per day, indicating clearly that he relied upon the demurrage

clause as applicable to the loading of the vessel at the Port of Montreal and basing his claim thereon.

Again, when he sailed, his pretensions were contradictory of any claim for dead freight; he availed himself of his reserved privilege to sail without full cargo, having already asserted his claims.

The question now at issue was not tried in *Lockhart* v. *Falk*, it was only the application and effect of the cesser of liability clause that was there in question, and without the exact language of the charter party in that case it would be impossible to judge whether it affords a parallel to the present as to the application of the provision for demurrage.

Again, suppose that the provision for demurrage is inapplicable, does it follow that the ship would have a right to the whole dead freight? If there had been no danger from ice setting in, would the ship have been entitled to leave the port of loading and claim for dead freight because she had been detained two days or longer? Were such damages under such circumstances in the contemplation of the parties to this contract? I should say that the ship-owner neither contemplated them nor claimed them, until, by an afterthought, he claimed them by this action. The setting in of frost to interrupt navigation exonerates a carrier from diligence in delivery, and the same reason would exonerate a shipper from the delivery of a cargo that could not be transported. True, it has been ruled in the English cases that a frost which delays or prevents the loading does not excuse the freighter; but if it occurs when the ship has been loaded the ship bears the loss. It would be the same if the freighters, as in this case, had the goods to load but the ship refused to receive them. The privilege which the the ship-owner in this case reserved to avoid detention was one stipulated for to be availed of in his own interest, for his own benefit, at his own risk and profit, and so far from its entitling him to dead freight, it operated an express renunciation of such a claim, and provided that he would have in lieu thereof what freight he could earn

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by calling at any open port or ports on the homeward voyage. It might have turned out that the captain was unnecessarily alarmed and that there would have been ample time to get out with safety. A like uncertain event cannot be made the measure of damage.

In my opinion the principal appeal should be allowed, and the ship-owner's action for dead freight dismissed. I would allow the cross appeal, and give the ship-owner judgment for damages for two days' detention.

The cesser of liability clause was urged in argument and might have been a sufficient defence, but as it had not been pleaded, it could not be applied. It is probable that it had been waived as a ground of defence.

DORION, C. J.:—

The question here is whether the ship owner is entitled to damages or to demurrage. If he is entitled to damages they are assessed by the judgment of the court below at an amount which is not to be disturbed. If, on the contrary, the ship owner is only entitled to demurrage, his claim would at most be about £100, while the judgment appealed from has given him £313. Demurrage is the compensation to be paid by the freighter for the detention of the ship beyond the time agreed upon, or allowed by usage, for loading and discharging (C. C. 2457). As the majority of the Court read the charter party in this case, there was no number of days fixed in which the freighter was bound to load, and therefore we agree with the learned judge who rendered the judgment in the Court below, that the claim is for damages and not for demurrage. Apart from the terms of the contract, there is a reason for believing that the ten days do not apply to the loading. The ship arrived on the 8th November, and was only ready to receive cargo on the 15th. If the charterer was entitled to ten days, it would give to the 25th November, which cannot be supposed. We think it clear that it is damages to which the party is entitled, and not demurrage. Perhaps the amount allowed by the Court below is a little too much, but under the circumstances

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we are not disposed to reduce the damages. I do not think the charterer really lost two and a half days. On one day it was snowing hard enough to excuse him from proceeding. But there is no doubt that the charterer in seven or eight hours more would have finished loading the cargo. Supposing there were only two days' delay, seven hours from that would still leave at least an unnecessary delay of one day, which would offset the cost of loading and unloading the shortage of freight, and in view of this the damages are reasonable.

There was another question raised. The ship owner says: "It is true we lost some time, but we loaded during "two nights when we were not obliged to do so, and "that made up for lost time." But it must be borne in mind that being in default to proceed with the loading with due diligence, he worked at night in his own interest. The more grain he put into the vessel the less would be the damages which he would have to pay in the event of the departure of the ship before the loading was completed

We think the appeal and the cross appeal should both be dismissed.

MONK, J.:—

I admit that I have been extremely embarrassed as to the mode in which this case should be disposed of. I don't think the evidence would justify us in giving demurrage. No doubt more diligence might have been used on the part of the charterer, but the evidence hardly supports a claim for demurrage. Under the circumstances I concur with reluctance in the judgment giving such a large amount for damages.

Appeal and cross-appeal dismissed.

Kerr, Carter & Goldstein, attorneys for appellants on principal appeal.

Abbott, Tait & Abbotts, attorneys for respondent on principal appeal.

(J. K.)

27 janvier 1885.

Coram SIR A. A. DORION, J.C., MONK, CROSS & BABY, JJ.

CHARLES B. WRIGHT,
(*Demandeur en Cour inférieure*),
APPELANT ;

ET

JOSEPH MOREAU ET UX.,
(*Défendeurs en Cour inférieure*).
INTIMÉS.

Rente constituée—Tiers-détenteur—Art. 338, *C.C.*

JUGÉ :—1o. Que depuis la mise en vigueur du Code Civil le tiers-détenteur d'un immeuble affecté au paiement d'une rente constituée créée pour le paiement du prix de vente, n'est pas personnellement responsable du paiement de cette rente.

2o. Que ce principe établi par le Code Civil s'étend à une rente constituée créée par un acte passé avant le code.

SIR A. A. DORION, J.C. :—

Les intimés, tiers-détenteurs d'un immeuble affecté au paiement d'une rente constituée créée par un acte de vente passé le 4 novembre 1833 pour le paiement du prix de vente, sont poursuivis personnellement pour le recouvrement de cinq années d'arrérages de la dite rente. La Cour Supérieure a rendu jugement le 26 janvier 1882 condamnant personnellement les défendeurs intimés à payer les arrérages réclamés. La Cour de Révision, par un jugement du 31 mai 1882, a renversé le jugement de la Cour Supérieure et a débouté l'action, en exprimant l'opinion que le tiers-détenteur d'un immeuble n'est pas tenu personnellement du paiement d'une rente constituée, et que l'article 99 de la Coutume de Paris ne s'applique pas aux rentes constituées.

Les articles 99 et 100 de la Coutume de Paris, sur lesquels l'appelant fonde ses prétentions sont conçus dans les termes suivants :—

" Articles 99. Les détenteurs et propriétaires d'héri-

" tages chargés et redevables de cens, rentes ou autres " charges réelles annuelles, sont tenus personnellement " de payer et acquitter icelles charges à celui ou ceux à " qui dues sont, et les arrérages échus de leur temps, tant " et si longuement que desdits héritages, ou de partie ou " portion d'iceux, ils seront détenteurs et propriétaires."

" Articles 100. Et s'entendent chargés et redevables, " quand lesdits héritages sont spécialement obligés, ou " qu'il y a générale obligation sans spécialité, ou qu'il y a " clause que la spéciale ne déroge à la générale, ni la " générale à la spéciale ; èsquels cas le détenteur est tenu " personnellement des dits arrérages."

L'appelant se base sur l'interprétation que les anciens auteurs ont donnée à ces articles, et malgré la répugnance que j'ai d'abord éprouvée à étendre l'application de ces deux articles aux rentes constituées, il me parait suffisamment établi que les auteurs les considéraient applicables aux rentes foncières et aux rentes constituées indistinctement.

Merlin, qui a collecté les opinions de tous les auteurs, s'exprime dans les termes suivants :—

" Sans doute, si le premier de ces deux articles était " isolé, il faudrait le restreindre aux rentes foncières, " conformément au droit commun de la France ; et c'est " ainsi qu'on l'entendait dans l'ancienne Coutume de Paris. " Mais le second article ayant été ajouté au premier, dans " la réformation de 1583, il n'y a plus à douter que les " rentes constituées n'y soient comprises."

" Loyseau, dans son *Traité du Déguerpissement*, liv. 2, " ch. 6, s'élève avec beaucoup de force contre cette nou- " velle disposition de la coutume ; il prouve très bien " qu'elle est contraire aux principes, et il donne avec rai- " son, pour les coutumes muettes, la préférence à l'article " 134 de la coutume de Sens, qui, relativement aux arré- " rages de rentes constituées échus depuis son acquisition, " ne soumet le tiers-acquéreur qu'à l'action hypothécaire. " Mais il ne laisse pas de convenir que, dans le territoire " de la coutume de Paris, il n'y a pas moyen de se sous- " traire à sa disposition : ' Toutefois (dit-il), puisque la

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" loi est écrite clairement, bien qu'elle soit rude, il la faut " garder.' " (*Merlin*, Quest. de Droit, vo. ' Arrérages,' § 1).

Merlin cite ensuite dans le même sens *Ricard*, sur l'article 99 C. de P., *Lemaître*, sur le même article, titre 5, *Bourjon*, Tome II, p. 528 (Ed. 1770), et un arrêt de la Cour de Cassation du 27 vendémiaire, Art. XI.

Toutes les autorités paraîssent donc établir que les articles 99 et 100 de la Coutume de Paris ne distinguent pas entre la rente foncière et la rente constituée, et que l'obligation personnelle à laquelle ils soumettent le tiers-détenteur, par rapport aux arrérages échus de son temps, s'applique à la rente constituée créée pour le prix d'un fonds aussi bien qu'à la rente foncière.

Mais notre droit a subi des modifications importantes depuis lors. Par les Statuts Refondus du Bas-Canada, chapitre 50, toutes les rentes foncières perpétuelles non rachetables sont déclarées rachetables à l'avenir et sujettes à toutes les lois et règles gouvernant les rentes constituées ordinaires, sauf à l'égard de la prescription. Ensuite l'article 338 déclare meubles par la détermination de la loi les rentes constituées et toutes les autres rentes perpétuelles ou viagères, sauf celle résultant de l'emphytéose laquelle est immeuble.

Il faut remarquer que cet article est constitutif de droit nouveau, ainsi que l'expliquent les codificateurs dans leur rapport (I, 266). Avant le code les rentes constituées avaient toujours été réputées immeubles, mais comme les Statuts Refondus avaient déclaré rachetables les rentes perpétuelles, et les avaient par là fait perdre le caractère immobilier que leur conférait la perpétuité, les codificateurs ont jugé à propos de suggérer comme amendement l'article qui a été adopté, et qui est devenu l'article 388 du Code. Le changement suggéré avait d'ailleurs été introduit en France par l'article 529 du Code Napoléon que nos codificateurs ont copié.

Les conséquences de cette nouvelle législation sont très clairement expliquées par *Demolombe* (Tome 9, p. 217): " Concluons donc (dit-il), que la rente foncière perpétuelle " a cessé d'exister . . . . . et que les trois carac-

" tères essentiels qui la distinguaient autrefois, sont aujour-
" d'hui remplacés par les trois caractères tout différents
" que voici :

" 1o. Elle est meuble, c'est à dire que le créancier ne
" conserve aucun droit dans l'immeuble par lui aliéné, et
" que le débiteur en devient plein et entier propriétaire ;

" 2o. Elle est rachetable ;

" 3o. Elle oblige toujours celui qui s'en est constitué le
" débiteur personnel et ses héritiers ; elle n'oblige jamais
" les tiers-détenteurs en cette seule qualité."

Il ne reste plus qu'à décider si la mobilisation des rentes constituées établie par l'article 388 de notre Code Civil affecte celles qui étaient déjà créées par des actes passés avant le code. Merlin (Répertoire, vo. Domicile élu, § 1, p. 363, 364 et 365) cite un arrêt du 14 juillet 1810 qui a décidé la question dans l'affirmative, et approuve cette décision en donnant des raisons qui nous paraissent concluantes.

La Cour est donc unanime à déclarer que les intimés ne sont pas obligés personnellement au paiement de la rente en question, et que le jugement de la Cour de Révision qui a renvoyé l'action de l'appelant doit être confirmé avec dépens.

Jugement confirmé.

Laflamme, Huntington & Laflamme, pour l'appelant.

Mercier, Beausoleil & Martineau, pour les intimés.

(E. L.)

November 23, 1885.

Coram DORION, C. J., MONK, RAMSAY, CROSS, JJ.

THE HAMILTON POWDER CO.
(Defendants in Court below),
APPELLANTS;

AND

LAMBE ES QUAL.,
(Plaintiff in Court below),
RESPONDENT.

Powers of Provincial Legislatures — License for storage of Gunpowder—41 Vict. (Q.) *cap.* 3, *sections* 170, 171—*Action for Penalty.*

HELD:—1. That a powder manufactory, where a quantity of powder exceeding 25 lbs. is kept, is a powder magazine within the meaning of 41 Vict. (Q.) cap. 3, sect. 170.

2. (By the majority of the Court):—That the Act above cited, which imposes a penalty for failing to take out a license, is not *ultra vires*, being in the nature of a police regulation, and as such within the powers of the local legislature, even supposing the provision of the Act requiring a fee of $50 to be paid for a license were *ultra vires* as a revenue tax.

(By RAMSAY, J.) That the Act is valid, not as a police regulation, but as a license Act, the local legislatures having power, under the B. N. A. Act, sect. 92, ss. 9, to pass an act for raising revenue by a license fee.

The action was brought by the respondent, in his quality of license inspector, to recover from the defendants a penalty of $500 for having made use of a powder magazine for the storage of powder without a license. The proceedings were based on 41 Vict. (Q.) chap. 3, sec. 170.

The defence was 1st. That the appellants, by their charter, were incorporated to carry on, in the county of Halton or elsewhere, all the necessary business connected with or appertaining to the manufacture and sale of gunpowders and acids, and with all powers incident thereto. The appellants had carried on their business at Belœil under the protection of their act of incorporation, and had never

kept any magazine for the storage of powder beyond what was necessary for their business. 2nd. That the Act referred to was *ultra vires*.

The Court below (LORANGER, J.) held that the provision requiring a license to be obtained, was not a revenue law, but merely a police regulation which it was competent to the provincial legislature to enact. Their act of incorporation did not exempt the appellants from compliance with police regulations. The judgment therefore condemned the appellants to pay the fine of $500.

Laflamme, Q. C., for the appellants, contended that the license duties were enacted by the legislature as a means of raising a revenue for the purposes of the province. It was so declared in 46 Vict., cap. 5, sec. 1. This was *ultra vires* of the Provincial Legislature.

Bourgoin, for the respondent, submitted that the provision in question, relating to the storage of powder, was enacted for the safety of the public, and, as a police regulation, was strictly within the jurisdiction of the provincial legislature.

CROSS, J.:—

The appeal in this case is from a judgment condemning the Hamilton Powder Company, at the suit of the Inspector of Inland Revenue, to pay a penalty of $500 for violation of the provisions of sec. 170 of the Quebec License Act of 1878, in using a powder magazine for the storage of gunpowder without a license. The provision of the statute in question is as follows:—

"Any person who keeps or makes use of a powder "magazine for the storage of powder without a license "shall be liable to a penal prosecution, under which he "may be condemned to a fine of $500."

The appellants have pleaded and contend that their Company was incorporated with power to manufacture and sell gunpowder by act of the Legislature of Canada before Confederation, and the privileges so conferred on them and hitherto enjoyed could not be interfered with by provincial legislation after Confederation; moreover, that

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the provisions of the provincial acts in this respect only applied to the keeping of powder for sale in quantities exceeding 25 lbs.; that they only stored what was necessary in the course of the manufacturing and sale of the article, and the legislature had no right to impose a tax for revenue purposes on such a manufactory, which they had declared the tax in question to be by statute of Quebec, 46 Vic., cap. 5, sec. 1, which reads as follows: "It is "declared that the duties payable for licenses imposed by "sec. 63 of the Quebec License law of 1878, were so "imposed in order to the raising of a revenue for the pur- "poses of this province, under the power conferred upon "the legislature of this province by the 9th par. of sec. 92 "of the British North America Act of 1867." Therefore, that as regards them, the appellants, the statute in question was illegal and *ultra vires*, and the penalty could not be recovered.

We do not find that any doubt was raised as to the fact of the appellants having manufactured and stored such quantity of gunpowder as rendered them liable to the penalty in question, provided the clause enacting the penalty is within the power of the Provincial Legislature.

Sec. 171 of the statute in question, 41 Vic., cap. 3, reads as follows: "Every building used for the storage or keep- "ing of any quantity of powder exceeding in weight 25 "pounds, is held to be a powder magazine within the "meaning of this law."

The proof made leaves no doubt that the penalty was incurred if the Provincial Legislature had the power to create such a penalty for a like act, that is for failing to take out a license.

So long ago as the enacting of the ordinance of Lower Canada, 59 Geo. 3, cap. 9, legislative provision was made for the storage of gunpowder in Quebec and Montreal, and by later acts the City Council of Montreal was authorized to make by-laws to regulate the removal and cartage of gunpowder through the city. Penalties were imposed by these statutes as well as authorized to be imposed by the by-laws of the City Council; and by sta-

tute of the Province of Canada, 27 & 28 Vic. cap. 51, the City Councils of Quebec and Montreal were authorized to make by-laws for licensing persons to keep powder magazines.

Apart altogether from the purposes of revenue, the handling and storage of so dangerous a combustible substance as gunpowder, would seem to be a proper subject of police regulation, and therefore proper to be controlled by, and made subject to license, therefore, within the jurisdiction of the Provincial Legislature.

It is quite a different question as to whether that Legislature could impose a revenue tax on the granting of such license. I consider that we are bound by the decision of the Supreme Court in the case of *Severn* v. *The Queen* (1) where it was held that the power to tax and regulate the trade of a brewer, fell within the class of subjects reserved by the 91st Sec. of the B. N. A. Act for the exclusive legislative authority of the Parliament of Canada, and was not within the legislative capacity of the Parliament of Ontario, nor did it fall within the scope of the powers conferred on that legislature by sub-sec. 9 of sec. 92 of the B. N. A. Act to deal exclusively with shop, saloon, tavern, auctioneer, and other licenses, the other licenses there referred to being restricted to those *ejusdem generis*, language which seems to have been made use of by their lordships of the Privy Council on reference to the same provision of the statute, as reported in Doutre's Book on the Constitution, p. 230. The case of *Severn* v. *The Queen* very much resembles the one now under consideration, but the license claimed to be required for that case could in no manner apply as a police regulation, as I think the one now in question could. It follows that the license might be good to regulate the storage of gunpowder, although it might not avail as a means of raising Provincial revenue; that is, the legislature may have required a revenue duty, where they should only have exacted a moderate fee for the granting of the license,

(1) 2 Supreme Court, Can. Rep. p. 70.

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such as imposed by section 63 of the License Act, which requires the payment of a fee of $1 on the granting of the license. This is exclusive of the revenue duty of $50 afterwards provided for. Then, if the controversy came up squarely as to whether the Legislature was providing for an exaction beyond its power, as it does in the case of the *City of Montreal & Walker*,(1) a reasonable allowance might be made for a license, for which there would be a valid consideration, and which would itself be legal, although inefficacious to warrant the extra exaction of a revenue duty. But it has been observed that the Statute of Quebec, 46 Vic., cap. 5, declares that the "duties payable for "licenses imposed by section 63 of the Quebec License law "of 1878 were so imposed in order to the raising of a reve-"nue for the purposes of this province under the power "conferred upon the Legislature of this province by the 9th "par. of section 92 of the B. N. A. Act of 1867." A leading motive for the passing of that act seems to have been to set at rest doubts which had arisen as to the constitutionality of the provision of said License act. This was apparently the reason for declaring in the first section of the 46 Vic., c. 5, that the duties were imposed for the purpose of Provincial revenue, thus apparently making its provisions fall more strictly within sub-sect. 9 of sect. 92 of the B. N. A. Act. They were empowered for revenue purposes to provide for the issue of the licenses specially enumerated in this par. and like licenses, but were not prohibited from regulating by licenses other matters falling within the scope of their powers, provided such other regulatory licenses were not for the purpose of raising revenue. Although the declaration in question in this statute 46 Vic., c. 5, was applicable as confirmatory of the duties imposed and which the legislature had the right to impose for revenue purposes, it was inapplicable to cases where the Legislature had a right to require a license to be taken to regulate as matter of police. Thus comes the question whether we can go against the Legislature's own

(1) *Vide* next case, p. 469.

interpretation of the meaning of an act previously passed by themselves, so as to hold the act good as a police regulation which they have declared an act for raising revenue. While we hold, as in the case of *Severn* v. *The Queen*, that they had no right to raise revenue by this means, I am disposed to consider it a mere mistake or oversight of the Legislature to have included in the class of revenue licenses the one in question, should it be held to be one not *ejusdem generis* with those specially enumerated. And inasmuch as it is our business rather to give effect to an act when it is possible to do so, than to consider it as having no effect, I hold that a license to meet the present case would still be valid as a police regulation, although it might be held void as to its provision for raising revenue, and that if it were so, it was in the power of the Powder Company to have demanded a license on the payment of a moderate fee, and in the power of the Legislature to have required the taking of such license and the payment for the same of a moderate fee, and that the objection made to the validity of the license is not a sufficient bar to the prosecution for the penalty.

One further observation I would like to make. If it were in the power of the Provincial Legislature to raise revenue by the issue of licenses for other purposes than those enumerated in the sec. 9, and such as were *ejusdem generis*, their power of taxation would be practically unlimited, inasmuch as what they could not do otherwise they could in most cases effect by means of a license.

As to the objection made by the company that they had rights acquired to them by their charter which could not be interfered with by subsequent legislation, this is obviously an unsound argument. Their incorporation gave them individuality, with power to manufacture and sell gunpowder in the same manner as any natural person could do, but it did not exempt them any more than a natural person from their share of the burdens of the state, such as might from time to time be legally imposed on them as on all persons subject to taxation.

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RAMSAY, J.:—

I concur fully in the judgment to reject this appeal; but I differ from the reason relied on for maintaining the action in the court below, and from the reason on which the judgment is confirmed by this court. The interpretation of our constitutional act presents great difficulties; but it is too important for the people of this country to justify us in deciding the questions that arise lightly. Nay, more, there should be a continuity of principle in our decisions, and we should endeavor not to evade the determination of the real question either by making distinctions where there is no difference, or in deciding on some other question than that in issue, in order to escape from the logical consequences of the statutory provisions.

The court below, and this court, maintain the action because it is for a penalty for not taking out a license to keep a powder magazine. It is said the license to keep a powder magazine is a police regulation, and it is therefore competent for the court to say that the law is not *ultra vires*. On the other hand, I think it is a license for the purpose of raising revenue by the nature of the act, and not a police regulation at all. It cannot be pretended that a government with general powers, which the local legislatures have, must on every occasion express its authority in so many words. Such a conclusion would be against all analogy. For instance, the warrant of this court is expressed in a few lines, although we are a statutory court, because we are a court of general jurisdiction. The exercise of our authority is a public fact which cannot be ignored; but a justice of the peace, who acts occasionally and without the surroundings of a court of record, is obliged at every step to declare his jurisdiction. So then it follows that the powers of the local legislatures are gathered from the subject matter and not from the declaration of their powers.

By section 60, 41 Vict., c. 3 (Q.), it is enacted that "every "person keeping a magazine for the storage of powder, or "who sells and holds for sale any quantity of powder, "must obtain from the license inspector a license to that

" effect." Section 68 establishes the tariff of duties payable under the statute. By section 170 a penalty is imposed for keeping a powder magazine without such license, and by section 171 it is enacted that "every building used " for the storage or keeping of any quantity of powder ex- " ceeding in weight twenty-five pounds is held to be a " powder magazine within the meaning of the law."

The action is to recover the penalty for keeping a magazine without such license. The company appellant contends (1) that it is a manufactory of powder and not a magazine, and therefore that it is not within the meaning of the act. This objection seems to me to be answered by section 171. (2) That the statute is *ultra vires* as being an interference with trade. To this objection it is answered that it is a police regulation. I cannot concur in that view. A license act might be so framed as to make it a police regulation; but this one is not. If defensible, it is as being a license under section 92, sub-section 9, B. N. A. Act, 1867. This, I think, it is. I am still of the opinion I was in 1878 when the case of the *Attorney-General & Queen Insurance Co.* was before this court. That case was appealed to the Privy Council and confirmed, but not on the ground taken here. It was there said that the act under which that suit arose was not a license act but a stamp act. Their Lordships said: "that the licensee is " not compelled to pay anything for the license, and, " what is more singular, is not compelled to take out " the license, because there is *no penalty* at all upon the " licensee for not taking it up," etc.(1) The case before us arises exactly on the penalty for not taking out a license, by which license a local revenue was to be raised. It is said that this question does not come up, for the action is not to recover the revenue, but only the penalty. I cannot understand this distinction. The Powder Company could not get the license without paying the contribution to the revenue; and the majority of the court condemns the company for not doing that which the company could

(1) See 1 Leg. News, pp. 410-413; 1 Cartwright, p. 127.

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not do without submitting to an exaction which the court intimates is illegal, or, at all events, which it will not declare to be legal. This appears to me to be an unfair position. I say so with all respect to the majority of the court, and by unfair I merely mean to say that it is not logically permissible so to deal with the matter. On the reasons I have endeavored to explain, I am to confirm.

DORION, C. J. :—

This is not an action to be paid a license fee, but a suit for a penalty for not taking out a license. The majority of the Court are of opinion that the question whether the local Legislature has a right to impose a license fee of $50 does not come up here. The Court holds that the Legislature has a right to impose a penalty for storing gunpowder in a quantity exceeding 25 lbs., and that is as far as the present decision goes. The other question, as to the license fee, is a difficult one, and it might have come up if a license had been refused, but there was no offer by the appellants here for a license.

Judgment confirmed.

Laflamme, Huntington, Laflamme & Richard, attorneys for appellant.

N. H. Bourgoin, attorney for respondent.

(J. K.)

November 27, 1885.

Coram DORION, C.J., MONK, CROSS, BABY, JJ.

THE CITY OF MONTREAL
(*Defendant in Court below*),
APPELLANT;

AND

JAMES R. WALKER,
(*Plaintiff in Court below*),
RESPONDENT.

Municipal Corporation—Power to license and regulate—License fee—Reception of thing not due—C. C. 1047.

HELD:—1. That a power granted to a municipal corporation to license and regulate a particular business does not authorize the exaction of a revenue duty, but only of a moderate fee sufficient to cover the cost of issuing the licenses, and of inspecting and regulating the same. So, where the City of Montreal was empowered to license and regulate junk stores, it was held that the exaction of a license fee of $50 per annum was illegal.

2. That where such fee had been paid to the city during three years in succession before contesting the validity of the exaction, the same might be recovered by the person who had paid the fee.

The judgment appealed from was rendered by the Superior Court, Montreal (MATHIEU, J.), April 9, 1884, maintaining an action for taxes illegally exacted. The City of Montreal, under the power granted by the charter to license and regulate junk stores, imposed a license fee of $50 per annum on junk stores. The respondent, after paying the fee during three years, refused to pay any longer, and being convicted by the Recorder, brought the case by *certiorari* before the Superior Court, and judgment was rendered by TORRANCE, J., June 22, 1882, quashing the conviction. (1) He then sued the city to recover $150 paid during the previous years.

The Superior Court held that the city had no right to

(1) See 5 Leg. News, p. 201, where this decision is reported at length.

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make the licensing of junk stores a source of revenue, and judgment was rendered in favor of the respondent for $150. The city appealed from this decision.

Ethier, for the appellant, submitted that under 27 Vic., ch. 51, s. 123, ss. 26, the city was empowered to license and regulate junk stores. In pursuance of this power, by-law No. 99 was passed, and the fee for the license was fixed at $50. This rate was not imposed with the object of raising a revenue, but because the supervision of such stores required special attention from the police department of the city, and involved extra expenditure. Another objection to the present action was that the plaintiff had paid the tax for several years without coercion. It was only after a series of years that he was advised by counsel to resist payment of the license fee. The plaintiff was bound to show that the tax was not due, and that he paid by error or coercion. On the question of imposing a reasonable fee for a license, reference was made to Dillon on Municipal Corporations: "We have no doubt that the legislature may, in regulating any matter that is a proper subject of the police power, impose such sums for licenses as will operate as partial restrictions upon the business or upon the keeping of the particular kinds of property regulated."

Béique, Q.C., and *McGoun*, for the respondent, contended that his right to recover what had been paid by error could not be disputed. Art. 1047 of the Code says: "He who receives what is not due to him, through error of law or of fact, is bound to restore it." The city had no right to collect a license fee of $50, and the judgment condemning it to refund the amount was correct. It was not shown that junk stores occasioned the city any additional expenditure, and there was no authority for the imposition of a revenue tax.

CROSS, J.:—

This is a suit in which James R. Walker, keeper of a junk store, sues the city to recover back three years' tax of $50 each, imposed by a by-law of the City council, in

the name of a fee for a license to keep a junk store, the same being illegal and declared to be illegal by a judgment of the Superior Court quashing a conviction by the Recorder, of said Walker, for keeping a junk store without taking out a license from the city corporation, to permit him to carry on the business of a junk dealer within the city of Montreal.

It appears that Walker was rated for and paid a regular business tax imposed by the corporation, being different and separate from the exaction imposed by way of license for a junk store, and paid three several years of the $50 per annum for the junk store, but objected to it, and finally refused to take a license, and was duly convicted of a penalty by judgment of the Recorder for failing to take out such license, so that his payments do not seem to have been voluntarily made. He now sues to recover them back, and includes a demand for expenses incurred by him in procuring the setting aside of the conviction of the Recorder, which was removed by *certiorari* to the Superior Court, and there quashed as illegal. The Superior Court gave Walker judgment for the three years of the tax, but rejected his claim for the expenses incurred on the *certiorari* for want of sufficient proof.

The City has appealed from the judgment. Much learning has been expended in the arguments and the citation of authorities on either side. It is to be regretted that the want of time does not allow of the Court being equally elaborate in treating the case for judgment, but we have gone over the authorities as best we could, and have come to the conclusion which in our opinion ought to be arrived at in the case. The real question seems to be narrowed down to whether the city was entitled to charge a sum on the issue of a license for a junk store which would amount to a revenue duty, and we have formed the opinion that they were not. We therefore decide to confirm the judgment of the Superior Court.

By sec. 123 of the City charter, 37 Vic., c. 51, as amended by 39 Vic., c. 52, the council are empowered to make by-laws, among other things, sub-sec. 26: "To license

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" and regulate junk stores." No power is given directly to impose a tax nor to indicate that the licensing power may be used for the purpose of raising revenue. The authorities cited on both sides seem to us to support the view that the power to license and regulate will not give authority to impose or exact a revenue duty, but only a moderate fee to cover the cost of regulating and granting a license. It must be confessed that this leaves the matter subject to a vague and indefinite rule, not very satisfactory in its application; but, inasmuch as no other seems available, we are driven to adopt it from the necessity of the case. It then leaves it to the discretion of the court to determine what should be considered a reasonable fee. The Superior Court have held that it was not reasonable for the city, under the circumstances, to exact $50 as a fee in such case to cover the cost of regulating and licensing junk stores. We do not feel called upon to interfere with the exercise of that discretion, nor the conclusion to which it leads. One of the authorities cited by the appellant might be given as an illustration: "Where the grant (to "license) is not made for revenue, but for regulation merely, " a fee for the license may be exacted; but it must be such " fee only as will legitimately assist in the regulation, and " it should not exceed the necessary or probable expense of " issuing the license and of inspecting and regulating the " licenses which it covers. But the limitation of the license " fee to necessary expenses will still leave a considerable " field for the exercise of discretion when the amount of " the fee is to be determined." Cooley on Taxation, p. 386, ch. 18. It would be more satisfactory if authorities specially applicable could be found in the English books, but the cases arise more frequently under the American system, and their experience is useful to us. Under both systems, in fact under all systems, and in reason, corporations cannot be allowed to impose burdens unless the authority is clearly given them by law, and only to the extent that the law distinctly authorizes. It appears that the city have themselves seen the propriety of adopting

this view by making a new by-law conformable to the principle above enunciated. 1885. City of Montreal & Walker.

DORION, C. J., on the right to recover the amount paid to the city by the respondent, remarked that in this case the debt did not exist. It was different from the case where a person had paid a debt which was justly due, but as to which prescription might have been pleaded.

Judgment confirmed.

Rouer Roy, Q. C., attorney for appellant.

Béique, McGoun & Emard, attorneys for respondent.

(J. K.)

January 27, 1885.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

REGINA v. PROVOST.

Reserved Case—Amendment.

HELD:—That where a Case Reserved for the consideration of the Court of Queen's Bench, pursuant to the Statute in that behalf, does not contain a question which, in the opinion of the full Court, it is essential to decide in connection with such case, it may be sent back to the Court which reserved the same, for amendment.

The Reserved Case was as follows:

On an Indictment for Robbery:

Reserved Case, stated by McDougall, J.

Rome Provost was tried before me, at the last term of the Court of Queen's Bench (Crown Side) in and for the district of Ottawa, held at Aylmer, P.Q., in December, 1884.

" He and one Médéric Richardson, were indicted in the same indictment for having, on the night of the 31st May last, assaulted one Aimé Turcotte, and robbed from him a silver watch and ten dollars in money; and a true bill was found against them on the 11th December, 1884.

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" Médéric Richardson had absconded and Provost alone was present for trial.

" On the 15th December, 1884, Provost, before being arraigned, filed a motion to quash the indictment, on the ground, principally, of the illegality and unconstitutionality of the Grand Jury which found it.

" A copy of the motion is hereunto annexed as appendix B; and I hereby refer to it as forming part hereof.

" My order was: ' Take nothing by the motion, but the ' matter will be reserved, in case of the conviction of the ' accused.'

" On the 27th December, 1884, the prisoner was arraigned and pleaded '*Not guilty*,' but before the petty jury was empanelled to try him, he filed a challenge to the array by a motion, a copy of which is hereunto annexed as Appendix C. The reasons are the same as in the motion to quash from No. 10 to the end, and the first in Appendix C. I gave the same order as on the motion to quash, viz: ' Take nothing, etc.'

" The trial then took place, and resulted in a verdict of ' *Guilty*.'

" The prisoner, on the 29th December, 1884, made a motion for a Reserved Case on the reasons stated in his motion to quash the indictment and to challenge the array.

" Before stating the questions of law which I am required to do, I may note that both the Grand Jury and the Petty Jury were summoned under the Provincial Statute 46 Vict., ch. 16, called " The Jury Act of the Province of Quebec."

" The questions for the Court of Queen's Bench on the Appeal Side, on which judgment is respectfully required by the present Reserved Case, are:—

" 1. Is the summoning of the Grand and Petty Jurors a matter of ' Procedure in Criminal matters,' and is not such matter under the exclusive legislative authority of the Parliament of Canada ?

" 2. Is the ' Jury Act of the Province of Quebec,' enacted by the Provincial Legislature, constitutional ?

" 3. Were the Grand and Petty Jurors, who acted in

the said term of the said Court, legally summoned by the Sheriff of the district of Ottawa under the said Act, and were their proceedings legal?

"4. In an indictment against two or more persons for robbery, should not the word 'together' be inserted, or something to show that the offence was a joint one?

"Aylmer, 8th January, 1885.

"WM. McDOUGALL, J.S.C."

McDougall was heard for the prisoner.

Fleming, *Q.C.*, and *C. P. Davidson*, *Q.C.*, for the Crown:

The statute 32 & 33 Vict. c. 29, s. 44, covers the case:—"And for avoiding doubt, it is declared and enacted, that every person qualified and summoned as a grand juror or as a petty juror in criminal cases, according to the laws which may be then in force in any province of Canada, shall be and shall be held to be duly qualified to serve as such juror in that province, whether such laws were passed before or be passed after the coming into force of the B. N. A. Act, 1867." The point, moreover, was raised in Ontario in *Regina* v. *O'Rourke*,(1) and decided in favor of the Crown. The case went to the Queen's Bench, and the decision was affirmed.(2)

RAMSAY, J.:—

This is a Reserved case, involving a constitutional question. There was a challenge to the array of the Grand Jurors and of Petty Jurors, on the ground that they were summoned on an Act of the local Legislature of Quebec, and that the Act was *ultra vires*. The learned Judge submits, as a matter of fact, that the Grand and Petty Jurors were summoned under the provisions of the Statute 46 Vic. cap. 16, "The Jury Act of the Province of Quebec," and he asks four questions:

[His Honor read the questions stated above.]

The object of the first three questions is to decide whether the Grand Jury and the Petty Jury have been

(1) 32 U. C. Com. Pleas, p. 388.
(2) 1 Ontario Rep. Q. B. Div. 464.

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summoned according to law. In effect, they raise a question which is of no practical importance in deciding the point really in issue, if the enactment contained in Section 44, 32 & 33 Vic. c. 29, be within the powers of the Parliament of Canada, and no question thereto is submitted to us.

The Court therefore orders that the case be sent back to the Court at Aylmer, which reserved the same, in order that the said case be amended by adding a question as to the effect of the Section 44, 32 & 33 Vic. c. 29, and whether the said enactment be within the powers of the Parliament of Canada.

The following is the judgment as recorded :—

" After having heard counsel, as well on behalf of the prisoner as for the Crown, and due deliberation had on the case transmitted to this Court, from the Court of Queen's Bench sitting on the Crown side at Aylmer, for the district of Ottawa ;

" It is considered and adjudged by the Court now here, pursuant to the Statute in that behalf, that the case so reserved for the opinion of the Court, be sent back to the said Court of Queen's Bench, sitting on the Crown side at Aylmer, in order that the said case be amended by adding a question as to the effect of the Section 44 of 32 & 33 Vict. c. 29, and whether the said enactment be within the powers of the Parliament of Canada."

Case remitted for amendment.

Fleming, *Q. C.* and *C. P. Davidson*, *Q. C.*, for the Crown.

McDougall for the prisoner.

(J. K.)

March 19, 1885.

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Coram DORION, C.J., MONK, TESSIER, CROSS, BABY, JJ.

REGINA v. PROVOST.

Powers of Federal Legislature—32 & 33 Vic. c. 29, s. 44—Jury Law, Province of Quebec, 46 Vic. c. 16 (Q.)—Indictment for Robbery.

HELD:—1. That the Parliament of Canada, in declaring, by 32 & 33 Vict. c. 29, s. 44, that "every person qualified and summoned as a "Grand Juror, or as a petty juror, in criminal cases, according to the "laws which may be then in force in any Province of Canada, shall "be and shall be held to be duly qualified to serve as such juror in "that Province, etc.," did not legislate *ultra vires*, and therefore the Jury Act of the Province of Quebec is constitutional.

2. The word "together" is not essential in an indictment against two persons for robbery, to show that the offence was a joint one.

The Reserved case, mentioned in the preceding report, came back amended by the addition of the following question:—

"5. What is the effect of the 44th Section of the 32 & 33 Vict. ch. 29, and is the said enactment within the powers of the Parliament of Canada?"

DORION, C.J.:—

We are all of opinion that there is nothing in the objection which has been made to the validity of the jury lists. The Parliament of Canada, soon after confederation, passed the 32 & 33 Vict. ch. 29, and by sect. 44, the local legislatures are authorized to establish the qualification of jurors:—"And for avoiding doubt, it is declared and "enacted that every person qualified and summoned as a "Grand or as a Petty Juror in criminal cases, accord-"ing to the laws which may be then in force in any pro-"vince of Canada, shall be and shall be held to be duly "qualified to serve as such Juror in that province, whether "such laws were passed before or be passed after the com-"ing into force of the B. N. A. Act, 1867, subject always "to any provision in any Act of the Parliament of Canada,

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" and in so far as such laws are not inconsistent with any " such Act." During the sixteen years since the passing of that Act the question of its validity has not been raised. Judges throughout the whole Dominion have sat and tried cases, and prisoners have been convicted of murder and executed, under the authority of this Act. Even if there were no Dominion Statute authorizing the local legislatures to determine the qualification of Jurors, it would be very difficult, after the lapse of such a time, to say that the system which has all along been pursued is illegal. But here there is an express statute of the Dominion Parliament. Both legislatures have agreed that the lists shall be made under the Provincial laws. Under these circumstances we have no difficulty whatever in declaring the conviction good.

There is another small point in the Reserved Case, as to the form of the indictment. The word " together " was omitted in the indictment. The forms given by all the authors show clearly that the word is not necessary. Each of the defendants committed the felony, although there were two of them. There was only one tried, and it was unnecessary to say that he committed the felony with another. One of the two may be tried and convicted and the other not.

On both points there is no difficulty in coming to the conclusion that the verdict must stand.

The following is the judgment of the court :—

" After having heard counsel, as well for the Crown as on behalf of the prisoner, and due deliberation had on the case transmitted to this court from the Court of Queen's Bench on the Crown side at Aylmer, in the district of Ottawa;

" It is considered and adjudged and finally determined by the Court now here, pursuant to the statute in that behalf, that an entry be made in the record to the effect that, in the opinion of this Court, the proceedings had and taken in the said Court at Aylmer aforesaid, are regular; that the ruling of the Judge presiding in the said Court of Queen's Bench is correct, and that no reason hath been

assigned by and on behalf of the said Rome Provost sufficient to set aside the conviction on the indictment in this cause.

"It is therefore ordered that the said conviction be, and the same is hereby affirmed, and that it do stand in full force and value."

Conviction affirmed.

Fleming, Q.C., and *Davidson*, Q.C., for the Crown.

McDougall for the prisoner.

(J. K.)

May 26, 1885.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

JAMES F. SHARPE ET AL.,
(*Defendants below*),
APPELLANTS;

AND

ROBERT D. CUTHBERT ET AL.,
(*Plaintiffs below*),
RESPONDENTS.

Contract—Lease of Steam-power—Sub-lease.

HELD:—That a contrat of lease of steam-power to the extent of six-horse power, was not violated by sub-letting a portion of the motive power, there being no more power used than was mentioned in the lease, and there being no prohibition against sub-letting.

The question decided is fully disclosed in the opinion of the Court.

M. Hutchinson and *Geoffrion*, Q.C., for the appellants.

Rainville, for the respondents.

CROSS, J.:—

Sharpe & McKinnon, the present appellants, being les-

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sees of the premises Nos. 47 and 49 William St., Montreal, and Cuthbert & Son, lessees of the adjoining premises in rear, in which they had a steam-engine, the latter agreed by deed before Marler, N. P., dated April 11, 1873, to provide and furnish Sharpe & McKinnon, during two years from 1st May then next, with motive power for the purpose of running the machinery on the premises of Sharpe & McKinnon, to the extent of six-horse power.

Cuthbert & Son brought the present action against Sharpe & McKinnon, claiming damages and the rescission of the lease, on their complaint that Sharpe & McKinnon had violated its provisions by sub-letting, to one McDonald, a portion of the steam-power furnished to them by Cuthbert & Son.

Sharpe & McKinnon pleaded that there was no prohibition of sub-letting in their lease, and that they had a right to do so, and that they had never used more steam-power than their lease entitled them to do.

The presiding Judge in the Superior Court, by consent of the parties, appointed an expert to determine, first, what machinery did Sharpe & McKinnon by themselves or other parties, run with the steam-power supplied by Cuthbert & Son; and secondly, whether the machinery run by them required more steam-power than was equal to six horses. The report was to the effect that less than six-horse power had been used or required, and that the greatest power required at any time had not been more than 4 3-10 horse-power, including power leased to McDonald to run his boot and rivet machine.

The oral testimony produced corresponded, and thereupon the Judge presiding in the Superior Court dismissed the action.

The case being inscribed in review, the Court in Review reversed the first judgment, and ordered Sharp & McKinnon to cease allowing McDonald to use part of the steam-power they had leased from Cuthbert & Son, and that within eight days of the service of the judgment, under penalty of the cancellation of the lease. Mr. Justice Sicotte, one of the presiding Judges, dissented, so that an

equal number of the judges of the Superior Court have been in favor of appellants Sharpe & McKinnon, to those against them, yet the judgment has been against them and they have appealed.

The case appears to be very plain. There was no prohibition to sublet, therefore, no reason or ground for the action of respondents. I would restore the original judgment dismissing the action.

The judgment is as follows :—

The Court, etc...

" Considering that in the judgment rendered in original jurisdiction, by the Superior Court at Montreal, on the 29th of March, 1884, there is no error, and that in the judgment of the Superior Court sitting in Review at Montreal, on the 9th of July, 1884, which has reversed the said judgment of the 29th of March, 1884, there is error ;

" Doth reverse and set aside the said judgment of the Superior Court sitting in Review ; and this Court, proceeding to render the judgment which the said Superior Court sitting in Review ought to have rendered, doth affirm the said judgment of the 29th of March, 1884, with costs as well in the Court below as in the Court here."

Judgment of C. R. reversed.

Macmaster, Hutchinson & Weir, attorneys for the appellants.

Duhamel, Rainville & Marceau, attorneys for the respondents.

(J. K.)

October 15, 1885.

[IN CHAMBERS.]

Coram DORION, C. J.

E. A. WHITEHEAD ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

R. WHITE
(*Plaintiff in the Court below*),
RESPONDENT.

Appeal to the Supreme Court—Injunction.

HELD:—That no appeal lies to the Supreme Court from a judgment in appeal confirming a judgment of the Superior Court granting an injunction, but reserving to adjudicate as to the amount of damages until after an account had been rendered.

The respondent instituted the present action against appellants to restrain them from using certain patents and machines, of which he was the proprietor, and claiming damages for the illegal use of same. Judgment was rendered 12th February, 1885, by the Superior Court, declaring respondent sole owner of the patents and machines, and granting an injunction against appellants; as to the claim for damages, the Court ordered the appellants to render an account, within a month, of all goods manufactured by them by means of said process and machines.

This judgment was confirmed in appeal on the 26th September, 1885.

The appellants applied for leave to appeal to the Supreme Court, and this application was opposed by the respondent upon the ground that the judgment sought to be appealed from, being an interlocutory judgment, there was no appeal under the Supreme Court Act.

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PER CURIAM :—

"Having heard the parties by their counsel on the petition of the said appellants for leave to appeal to the Supreme Court of Canada, and considering that the judgment rendered by the Superior Court, on the 12th February, 1885, and affirmed by this Court on the 26th September, 1885, is not a final judgment coming within the description of judgments from which an appeal lies to the Supreme Court, the said petition is hereby rejected with costs."

L. N. Benjamin for Appellant Petitioner.

Laflamme, Huntington, Laflamme & Richard for Respondent.

(J. J. B.)

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26 mai 1885.

Coram SIR A. A. DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, JJ.

J. B. T. DORION

(*Défendeur en Cour Inférieure*),

APPELANT ;

ET

P. A. A. DORION

(*Demandeur ès qualité et Intervenant en Cour Inférieure*),

INTIMÉ.

Curateur à substitution—Responsabilité et pouvoirs—Art. 931 *C. C.—Intérêts des intérêts—Prescription des intérêts échus avant et après la mise en force du Code—C.C.* 2250 *et* 2270.

JUGÉ :—1o. Que le curateur à une substitution n'a aucun droit de recevoir les capitaux appartenant à cette substitution, et dont il doit être fait emploi conformément à l'article 931 du Code Civil.

2o. Qu'un tel curateur n'a pas non plus le droit de réclamer les intérêts de ces sommes capitales, ces intérêts étant dûs aux grevés de substitution,

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3o. Que l'appelant, n'ayant reçu les deniers appartenant à la dite substitution que comme procureur des grevés, et simple *negotiorum gestor*, il n'était pas tenu de payer les intérêts des intérêts des sommes par lui reçues si ce n'est depuis la demande qui en a été faite par l'intervention produite par l'intimé; l'obligation de payer les intérêts des intérêts n'incombant qu'à ceux qui reçoivent des deniers pour des incapables.

4o. Que, en vertu des articles 2250 et 2270 du Code Civil, les intérêts échus avant le 1er août 1866, date de la mise en force du Code, ne se prescrivent que par trente ans, et que ceux échus depuis cette date, et dont la prescription n'a commencé à courir que depuis la mise en force du Code, se prescrivent par cinq ans.

Appel d'un jugement prononcé par la Cour Supérieure siégeant à Montréal (MATHIEU, J.) le 9 juillet 1883.

RAMSAY, J. (*diss.*):—

The appellant was some time curator to the substitution created by the will of the late Jacques Dorion, of St. Eustache. Owing to certain family difficulties he ceased to be curator. M. Moreau was then named curator, and in that capacity he brought an action against appellant, the conclusions of which are as follows:—

" Pourquoi le dit demandeur, en sa dite qualité *de tuteur*, conclut à ce que le défendeur soit assigné à comparaître devant cette Honorable Cour, pour se voir condamné à rendre immédiatement un compte juste, fidèle, exact et sous serment, de la gestion et administration qu'il a en sa dite qualité de curateur à la substitution créée par le testament du dit feu Jacques Dorion, et des biens d'icelui, avec les intérêts et les intérêts des épargnes, à compter du jour du paiement des différentes sommes d'argent reçues par le dit défendeur, en sa dite qualité, en outre et à produire avec le dit compte et à son soutien toutes les pièces justificatives d'icelui, comme aussi et à mettre le dit demandeur, en sa dite qualité, en possession de tous les titres, papiers, pièces et renseignements qui regardent la dite succession, la dite curatelle, non-seulement de la sienne propre, mais aussi de celle du curateur immédiat, savoir le dit Charles Dorion, que le dit demandeur a, en sa dite qualité, droit d'avoir du défendeur, sinon et à défaut par le dit défendeur de satisfaire immédiatement à

tout ce que dessus, pour se voir condamné personnellement à payer au dit demandeur, en sa dite qualité, une somme de douze mille livres de cours actuel, pour tenir lieu du dit compte, de la remise des dits titres, pièces et renseignements, et à se faire contraindre par toutes voies que de droit et même par corps, le dit demandeur en sa dite qualité se réservant le droit de prendre toutes et autres nouvelles conclusions, dont il aurait besoin, dans le cas où il écherrait, le tout avec intérêt et depens, dont les soussignés demandent distraction."

The declaration is dated 27th June, 1859.

On the 3rd November, 1863, appellant filed a defence to this action in which he alleges that he has never refused to render an account, and that being put *en demeure* to render this account he does so, and he explains all the items of the account but some interest on a loan to the family Debartsch because his co-legatees *en usufruit* had brought two actions to account against him touching this interest, and that the matter was now in litigation between them.

It will be observed that in addition to his quality of curator of the substitution the appellant was a co-legatee *en usufruit*, and it is to be presumed that it was in this latter capacity he had this property in his possession. He was therefore accountable to Mr. Moreau for the condition of the property, but Mr. Moreau had no right or quality to ask him for the property. This is admitted, but it is said it does not signify as he came in and admitted his liability to pay so much money. As I understand the record this is not so, but in explaining incidentally how the estate stood he admits that he has in hand, on the 3rd November, 1863, £1,640 4s 10d.

On the 4th January, 1865, *débats de compte* were filed by Mr. Moreau; on the 7th July 1866 respondent took Moreau's place as curator to the substitution; on 15th May 1867, he took up the *instance* as curator, and on the 14th September, 1881, he moved that the appellant should be compelled to constitute new attorneys.

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On the 11th September, 1881, respondent in his quality produced the following declaration:

"Le dit demandeur ès-qualité par reprise d'instance " demandant acte de la déclaration faite par le dit J. B. T. " Dorion, en sa reddition de compte qu'il est débiteur de " la succession de la somme de $8,427.73, déclare qu'il " accepte la reddition de compte telle que produite par le " dit défendeur ainsi que les conclusions de sa défense, et " en demande acte."

This was preparatory to an inscription for final hearing on the merits for the 13th December, 1881. On the 12th a motion was presented to ask delay to plead, (*a*) that defendant was not obliged to account; (*b*) new facts. The Court granted appellant leave to plead new facts, but refused leave to replead as to the right of respondent to demand an account, inasmuch as appellant "ne peut revenir sur cette admission et reconnaissance de sa part," *i.e.*, contained in his first plea. The appellant asked for leave to appeal from this judgment because of the limitation as to the re-pleader. But leave was refused, and properly because the right of action of a curator to a substitution could always come up on final judgment.

The appellant then filed a plea containing a variety of allegations. To this, a special answer was made, and the case was inscribed for hearing and was heard.

While the record was *en délibéré* respondent's attention seems to have been awakened to the probability that the issues as to the payment of money for interest in his capacity of curator to the substitution, would go against him, and he filed an intervention as the representative of all the *grevés* under the authority of a judge in chambers, setting up this right to the balance of money in the hands of appellant as representing, by cession and otherwise, all the *grevés*. It is plain the judge in chambers had no right to compel the Court to discharge the *délibéré*, and that if final judgment had been rendered it would have been binding. But the judge who heard the case did discharge the *délibéré*, and the appellant filed answers to the intervention.

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I presume that if it had not been for the appellant having pleaded over, there would not have been two opinions in the Court. But notwithstanding this sort of acquiescence, I consider the respondent's position so unfavorable and the order of the judge in chambers so far out of his jurisdiction, that I think we should dismiss the intervention and give the judgment on the merits the Court below ought to have given. I have said the respondent's position is unfavorable; he has been conversant with all the facts for years, and it is not until he becomes aware by the argument that he is going to lose his case, that he seeks to engraft a totally new suit on this tedious litigation.

It is said that when two parties are disputing about a thing the real owner may be allowed to come in and claim his property. But that is not what took place here. The two parties were discussing a totally different thing, and one of them, changing his quality, adds a totally new contestation to the great embarrassment of the suit. The equitable desire to admit parties to suits in order to avoid litigation is a very good thing, but it may easily be abused. And so it was in the old court of chancery. Parties were put in so readily from equitable motives that the suit often became unmanageable and ruinous. In addition to this, the case before us had reached a stage where the intervention could not be introduced but by an order of the judge seized with it. The article which says that interventions may be admitted *en tout état de cause* must be read subject to the meaning to be attached to the technical terms in which it is framed. "*En tout état de cause*," in law does not include *en état d'être jugée*. This has been held in everything. In the case of *Williamson & Rhind*, Mr. Justice Sanborn, delivering the judgment of this Court, said that "to permit of proceedings being taken after the case was submitted" was against all practice. After a case has been once regularly submitted, the Court is seized of it, and it can only be afterwards dealt with by permission obtained from the Court or judge. 22 L. C. J. 167. (1)

(1) In a case of *Baxter & Dorion*, 10 Q. L. R., the Superior Court seemed indisposed to accept the ruling in the case of *Williamson & Rhind*, on the

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"En principe, l'intervention est recevable en tout état de cause, c'est-à-dire tant que l'instruction n'est pas close, tant que l'office des avoués n'est pas terminé, tant que celui des juges n'a pas commencé, en un mot jusqu'au jugement sur le fond ou au délibéré sur ce jugement, etc." Dalloz, Vo. Intervention, No. 102.

SIR A. A. DORION, J.C. :—

Jacques Dorion, de son vivant marchand de St.-Eustache, a fait un testament en 1821, par lequel il a légué tous ses biens à son frère Charles Dorion avec substitution en faveur des enfants mâles de ce dernier, tant qu'il y en aurait portant le nom de Dorion. Il est mort peu de temps après et son frère Charles Dorion, seul grevé de substitution, fut nommé curateur à la substitution.

A la mort de ce dernier, en 1840, l'appelant, son fils et l'un des grevés, a été nommé curateur à la substitution.

En 1858 l'appelant a été destitué et Pierre Moreau nommé curateur à sa place.

Ce dernier a de suite porté une action en sa qualité de curateur, par laquelle il a demandé à l'appelant un compte des deniers qu'il avait reçus en sa qualité de curateur et des intérêts sur les capitaux qu'il avait en mains.

L'appelant n'a pas contesté cette action. Il a déclaré qu'il avait toujours été prêt à rendre compte, et il a produit avec sa défense un compte par lequel il reconnaissait qu'il avait entre les mains une somme de £1,640.4.10, portant intérêt du 14 août 1858, et qu'il devait en outre à la substitution, pour prix d'une maison, les deux-tiers d'une somme de sept cent louis, l'autre tiers étant dû par Zéphire Dorion, son frère, et qu'il était prêt à payer ces sommes au demandeur Pierre Moreau, *si ce dernier était autorisé à les recevoir*, moins cependant la somme de $70 pour le coût de son compte et des pièces justificatives, avec

principle that where the law gave a right the party could not be deprived of it. That is true, but the question is whether the law contemplated judgment being reserved. The expression of disapprobation by the Court of Review was unnecessary, inasmuch as it never was pretended that the Court seized with a case might not discharge the *délibéré*.

intérêt du 14 août 1858, moins un sixième de ces intérêts qui lui appartenait, comme étant l'un des six grevés de substitution alors vivants.

Plus tard, Pierre Moreau a été déchargé de sa charge de curateur à la substitution, et l'intimé a été nommé curateur à sa place. L'intimé a alors repris l'instance, puis il a demandé acte de la déclaration que l'appelant avait faite, par son compte, qu'il devait à la substitution une somme de $8,427.63 avec intérêt du 14 août 1858, et déclaré qu'il acceptait cette reddition de compte, ainsi que les conclusions de la défense de l'appelant. Les procédures furent alors suspendues pendant plusieurs années, après quoi l'intimé ayant témoigné l'intention de continuer ces procédures, l'appelant obtint permission de plaider les faits nouveaux qui étaient survenus depuis sa première défense.

Il a, en conséquence, produit une défense additionnelle dans laquelle il a allégué que, depuis qu'il avait rendu son compte, il avait réglé avec les autres grevés de substitution, qui étaient Charles Dorion, Eustache Dorion et Firmin Dorion, pour la part qui revenait à chacun d'eux des fruits et revenus des biens de la substitution; qu'il avait de plus payé à Sévère Dorion, fils de Sévère, un autre de ses frères, la part qui lui revenait, tant dans les biens substitués que dans les revenus, et que Charles Zéphire Dorion, un autre de ses frères, était décédé le 11 juin 1871, et lui avait légué tous ses biens. En un mot, par ce plaidoyer l'appelant alléguait qu'il représentait, comme légataire universel de Zéphire Dorion, la part que ce dernier aurait eu droit de réclamer dans les fruits et revenus des biens substitués, et qu'il avait payé aux quatre autres grevés de substitution la part qui leur revenait dans ces mêmes revenus.

Par sa réponse à cette nouvelle défense, l'intimé a allégué que c'était lui qui avait payé à Sévère Dorion, fils, la part que ce dernier avait droit de recevoir, non seulement dans les biens substitués, mais encore dans les revenus provenant de la substitution, et que l'appelant n'avait droit de retenir qu'une somme de $2,000 avec

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intérêt du 28 novembre 1879, que l'intimé s'était chargé de payer à son acquit, plus la part des revenus auxquels Zéphire Dorion avait droit, et ce qu'il avait payé à Charles Dorion, Eustache Dorion et Firmin Dorion.

Sur cette contestation, les faits n'étant pas contestés, la cause fut plaidée devant M. le juge Taschereau et prise en délibéré.

Pendant le délibéré, l'intimé présenta à M. le juge Papineau une requête dans laquelle, alléguant qu'il était devenu le cessionnaire des grevés de substitution Charles Dorion, Eustache Dorion, Firmin Dorion, de Sévère Dorion fils, et de l'appelant lui-même, il demandait à être reçu partie intervenante pour exercer les droits de ses cédants, et concluait à ce que l'appelant fût condamné à lui payer, tant en sa qualité de curateur à la substitution que comme cessionnaire des grevés de substitution, les sommes que l'appelant avait reconnu devoir par son compte. Cette requête, non communiquée, c'est-à-dire, dont avis n'avait pas été donné à l'appelant, fut néanmoins accordée par M. le juge Papineau. Plus tard l'appelant présenta une requête pour faire rejeter cette demande en intervention, mais sans succès.

Finalement, la cause fut entendue au mérite devant M. le juge Mathieu, et l'appelant condamné à payer à l'intimé une somme de quatorze mille et quelques centaines de piastres pour intérêt sur les capitaux qu'il avait entre les mains appartenant à la succession, ces intérêts comprenant les intérêts des interêts calculés de six mois en six mois, la Cour s'abstenant d'ordonner le paiement du capital, et reconnaissant par là que l'intimé n'avait aucun droit de recevoir les capitaux appartenant à la substitution, mais se réservant d'adjuger sur le placement de ces capitaux.

L'appelant, se prétendant lésé par ce jugement, en a appelé, et soumet que la requête en intervention n'aurait pas dû être admise après que la cause avait été prise en délibéré; qu'en supposant que l'intimé eût le droit d'intervenir dans la cause, il ne pouvait tout au plus réclamer que cinq ans d'intérêts, le surplus ayant été prescrit; que de plus il ne devait pas les intérêts des intérêts.

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Sur la première question, M. le juge Ramsay et moi nous sommes d'opinion que la requête en intervention n'aurait pas dû être reçue. En effet, la cause étant inscrite et en délibéré devant un des juges de la Cour Supérieure ; un autre juge de cette cour, en admettant la requête en intervention, prenait sur lui de retirer du délibéré une cause entendue devant un autre juge.

Je ne crois pas nécessaire de décider qu'il n'avait pas de jurisdiction. Il peut y avoir des cas d'une urgence telle qu'un juge pourrait peut-être prendre sur lui d'admettre une intervention dans une cause pendante devant un autre juge ; mais ici cette urgence ou nécessité n'existait pas, et il aurait certainement été plus convenable de référer cette requête en intervention au juge qui était saisi de la cause et qui en connaissait tous les incidents, puisque cette cause avait été plaidée devant lui.

La conséquence de l'admission intempestive de cette intervention a été que la cause a été retirée du délibéré, qu'elle a été subséquemment plaidée devant un autre juge, M. le juge Mathieu, qui lui-même a déclaré que cette intervention n'était pas tout à fait régulière, et que, néanmoins, il croyait devoir adjuger sur les conclusions que l'intimé y avait prises.

Pour ma part je considère que cette intervention était, en effet, tout à fait irrégulière.

L'intimé était demandeur par reprise d'instance dans une action où, par ses conclusions, il demandait à ce que l'appelant fût condamné à lui payer 1° les sommes capitales qu'il avait reçues de la substitution créée par le testament de feu Jacques Dorion ; 2° les intérêts de ces sommes.

Or, en sa qualité de curateur à la substitution, il n'avait aucun droit de toucher les capitaux appartenant à la substitution, et c'est ce que la Cour de première instance a reconnu, puis qu'elle a refusé d'ordonner le paiement de ces capitaux à l'intimé.

Si l'intimé, en sa qualité de curateur à la substitution, n'avait pas le droit de recevoir les capitaux appartenant à la substitution, il avait encore moins le droit de recevoir

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les intérêts de ces capitaux qui appartenaient aux grevés de substitution qu'il ne représentait pas. Tout ce qu'il pouvait demander par son action, c'était que l'appelant fût condamné à rendre compte de ces capitaux et à en faire le placement, conformément à l'art. 931 du Code Civil.

Par sa requête en intervention, l'intimé demandait donc à faire une nouvelle demande relativement aux intérêts dûs aux grevés de substitution, qu'en sa qualité de curateur à la substitution il n'avait pas pu réclamer.

J'aurais donc été d'opinion de rejeter la requête en intervention de l'intimé et de renvoyer le dossier à la Cour inférieure, pour y être ordonné que les deniers que l'appelant avait reconnu devoir à la substitution seraient placés, ainsi que le veut l'art. 931 C.C., dans l'intérêt des appelés. La majorité de la Cour étant d'une opinion contraire, je ne crois pas devoir différer sur une question de simple procédure comme celle-là.

Ceci nous oblige à considérer la question des intérêts, et nous sommes venus à la conclusion que l'appelant n'avait reçu les deniers appartenant à la substitution en aucune qualité qui pût le soumettre à l'obligation de payer les intérêts des intérêts. L'obligation de payer l'intérêt des intérêts n'incombe qu'à ceux qui reçoivent des deniers pour des incapables ; mais l'appelant n'a pas reçu de deniers pour des incapables.

Il était l'un des grevés de substitution, et, en reçevant les sommes dues par les débiteurs de la succession, il n'a fait que recevoir ce que lui-même et les autres grevés de substitution auraient pu recevoir à la charge de placer les deniers, ainsi qu'il a été ordonné par plusieurs jugements produits dans le dossier. Il parait même, par les pièces justificatives produites par l'appelant, qu'il a reçu plusieurs des sommes de deniers dont il a rendu compte, sinon toutes, en vertu de procurations que ses co-grevés de substitution lui avaient données. Il n'était ni le tuteur, ni le curateur de ses co-légataires, et l'intérêt qu'il leur doit sur les capitaux qu'il a reçus pour eux est l'intérêt ordinaire que doit celui qui a reçu des deniers pour d'autres.

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Le jugement de la cour de première instance ne condamne pas l'appelant à payer les sommes qu'il a entre les mains à des incapables, mais de les payer à l'intimé, comme cessionnaire des grevés de substitution à qui ils sont dues. L'appelant n'est ni le tuteur, ni le curateur des grevés de substitution ; il a seulement, en vertu de procurations qu'ils lui ont données, reçu des capitaux dont les revenus leur appartiennent, et il a reconnu leur en devoir les intérêts, mais ces intérêts sont les intérêts ordinaires que doit celui qui a reçu des deniers pour autrui et a promis de les payer, et non les intérêts composés dûs par ceux qui ont géré pour des incapables.

Il est évident que les grevés de substitution n'étaient pas des incapables, puisque plusieurs d'entre eux ont poursuivi l'appelant et transigé avec lui pour ces mêmes intérêts, ainsi qu'il appert.

Maintenant combien d'années d'intérêts l'intimé a-t-il droit de recouvrer ? Cette question est nouvelle et d'une grande importance.

Avant le Code les intérêts de la nature de ceux qui sont réclamés ne se prescrivaient que par trente ans. Depuis le Code, en vertu de l'art. 2250 C. C., ils se prescrivent par cinq ans. Or, en vertu de l'art. 2270 C. C, les prescriptions commencées avant le Code sont réglées par les lois qui étaient alors en force, mais celles commencées depuis le Code sont réglées par les dispositions du Code. Tous les intérêts échus avant le Code doivent donc être réglés par les lois alors en vigueur, puisque la prescription de ces intérêts avait commencé avant la mise en force du Code, mais la prescription des intérêts échus depuis la mise en force du Code n'a commencé à courir que depuis le Code, et doit être réglée par l'art. 2250.

C'est là l'opinion de tous les auteurs qui ont écrit sur le Code Napoléon qui contient les mêmes dispositions que le nôtre, et la jurisprudence en France est incontestable que ce n'est pas la date de la créance qui détermine quelle est la loi qui doit régler la prescription des intérêts, mais que c'est celle de l'échéance de ces intérêts ; en effet, avant cette échéance la créance pour ces intérêts n'existait

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même pas. D'après cette jurisprudence, qui a été suivie par plusieurs jugements de la Cour Supérieure, les intérêts échus avant le Code se prescrivent par trente ans, tandis que ceux échus depuis le Code se prescrivent par cinq ans.

En admettant donc l'intervention de l'intimé comme bien fondée, il n'a droit, comme représentant ses auteurs grevés de substitution, qu'aux intérêts échus depuis les paiements que l'appelant a faits aux grevés de substitution jusqu'au 1er août 1866, et à cinq ans d'intérêts, qui ont précédé la requête en intervention présentée par l'intimé, cette requête étant la seule demande légale qui ait été faite de ces intérêts. Ces intérêts forment une somme de $2,739.70, dont il faut déduire celle de $2,000, avec intérêt du 28 novembre 1879 jusqu'au 27 juin 1882, date de l'intervention de l'intimé, que l'intimé a reconnu devoir et est tenu de payer à l'acquit de l'appelant, ce qui laisse une balance en faveur de l'intimé d'une somme de $525.37, et c'est là la somme que l'appelant est condamné à lui payer avec intérêt du 27 juin 1882, date de la demande qui en a été faite par l'intervention de l'intimé.

Le jugement formel est dans les termes suivants :—

" Considérant que le 21 mars 1821 Jacques Dorion, de son vivant marchand de la paroisse de St-Eustache, aurait fait son testament olographe, par lequel il a légué la jouissance de ses biens à son frère Charles Dorion, avec substitution en faveur des enfants nés et à naître de son dernier mariage, pour descendre de père en fils tant qu'il y aurait des enfants du nom de Dorion ;

" Considérant que le 20 août 1840, l'appelant a été nommé curateur à la substitution en remplacement du dit Charles Dorion, son père, récemment décédé ;

" Considérant que le 14 août 1858 Pierre Moreau, avocat, a été nommé curateur à la substitution pour remplacer l'appelant, et qu'en cette qualité il a, dès le 27 juin 1859, porté cette action par laquelle il a conclu à ce que l'appelant fût condamné à lui rendre compte de la gestion et administration qu'il avait en sa qualité de curateur aux biens substitués par le dit Jacques Dorion ;

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"Et considérant que le 3 novembre 1863 l'appelant a produit un compte, par lequel il a reconnu qu'il avait entre les mains: 1° une somme de £1640.4.10, qu'il avait reçue pour la dite substitution. 2° £466.13.4 pour les deux-tiers de la somme de £700, prix d'un immeuble qu'il avait acheté avec son frère Zéphir Dorion; ces deux sommes formant celle de £2106.18.2, égale à $8,427.63, avec intérêt à compter du 14 août 1858;

"Et considérant que par son compte l'appelant a offert de payer, au demandeur Pierre Moreau, si ce dernier était autorisé à recevoir, cette somme de $8427.63 et les intérêts échus, moins cependant une somme de $70 pour le coût de son compte, et la part des intérêts qui lui appartenait à titre de grevés de substitution, et qui consistait dans un sixième des intérêts échus lors de sa reddition de compte;

"Et considérant que ni le dit Pierre Moreau, ni l'intimé qui l'a remplacé n'avaient en leur qualité de curateur à la substitution aucun droit de recevoir les capitaux appartenant à cette substitution, et dont il doit être fait emploi comformément à l'article 931 du Code Civil, et que le jugement rendu par la Cour de première instance n'a pas non plus condamné l'appelant à payer à l'intimé ces sommes capitales;

"Et considérant que les dits Pierre Moreau et le dit intimé en leur qualité de curateur à la substitution n'avaient aucun droit de réclamer les intérêts de ces sommes capitales, ces intérêts étant dûs aux grevés de substitution;

"Et considérant que la requête en intervention produite par l'intimé tant en sa qualité de curateur à la substitution qu'en son nom personnel comme représentant quatre des grevés de substitution survivants, savoir Charles Dorion, Eustache Dorion, Firmin Dorion, et l'appelant lui-même, ainsi que Sévère Dorion, fils de Sévère, l'un des appelés à la substitution, ne peut être regardée que comme une nouvelle demande faite à la date où la dite requête a été présentée, savoir le 27 juin 1882, et qu'en vertu de cette nouvelle demande l'intimé ne peut tout au plus réclamer en son nom personnel comme représentant les dits Charles Dorion, Eustache Dorion, Firmin Dorion, Sévère

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Dorion et l'appelant, que les intérêts qui n'ont été ni prescrits, ni payés par l'appelant ;

" Et considérant que l'appelant qui, dans son plaidoyer additionnel, a allégué qu'il avait réglé avec les autres grevés de substitution pour les intérêts qu'il leur devait, et qu'il a prouvé qu'il avait payé au dit Charles Dorion les intérêts qui lui étaient dûs jusqu'au 23 janvier 1864, au dit Eustache Dorion jusqu'au 5 novembre 1864, au dit Firmin Dorion jusqu'au 29 mai 1865, et à Sévère Dorion, fils de Sévère, jusqu'au 26 janvier 1866, et que Charles Zéphir Dorion, un autre des grevés de substitution, est décédé le 11 juin 1871 après avoir fait son testament, par lequel il a légué au dit appelant tous ses biens en usufruit ;

" Et considérant que par son compte rendu le 11 novembre 1863 l'appelant s'est réservé la part des intérêts alors échus et qui revenait sur les capitaux dûs à la dite substitution, et que l'intimé a formellement accepté ce compte ainsi que les conclusions de la défense de l'appelant ;

" Et considérant que, tant à raison de l'acceptation du dit compte qu'à raison de ce que le dit appelant n'a reçu les deniers appartenant à la dite substitution que comme procureur des autres grevés de substitution et simple *negotiorum gestor*, il n'est pas tenu de payer les intérêts des intérêts des sommes par lui reçues, si ce n'est depuis la demande qui a été faite par l'intervention de l'intimé produite le 27 juin 1882 ;

" Et considérant que l'intimé ne représente le dit Sévère Dorion, fils, qu'en vertu d'une subrogation contenue dans un acte devant Labadie, Notaire, reçu le 25 avril 1866, pour une somme qu'il a payé à l'acquit de l'appelant, et que cette somme n'est pas demandée par son intervention ;

" Et considérant que l'intimé ne représente que quatre des grevés de substitution, savoir : Charles Dorion, Eustache Dorion, Firmin Dorion et l'appelant, ce dernier contestant néanmoins la validité de la cession qu'il a faite de ses droits au dit intimé ;

" Et considérant qu'en vertu des articles 2250 et 2270 du Code Civil les intérêts échus avant le premier août

1866, date de la mise en force du Code Civil, ne se prescrivent que par trente ans, et que ceux échus depuis le 1er août 1866 et dont la prescription n'a commencé à courir que depuis la mise en force du Code se prescrivent par cinq ans ;

"Et considérant que jusqu'au décès du dit Charles Zéphir Dorion la substitution était représentée par six souches, et par cinq seulement depuis, en sorte qu'en vertu de ce que dessus l'intimé, comme représentant les dits Charles Dorion, Eustache Dorion, Firmin Dorion et l'appelant, a droit au quatre-sixièmes des intérêts échus pendant les cinq années qui ont précédé le 27 juin 1882, date de l'intervention de l'intimé ;

"Et considérant que les intérêts sur la part du dit Charles Dorion, du 23 janvier 1864 au 1er août 1866, se montent à la somme de $212.48 à laquelle il faut ajouter celle de $505.65 pour les cinq ans d'intérêts échus le 27 juin 1882 ; en tout..... $718 13

"Que les intérêts sur la part du dit Eustache Dorion, du 3 novembre 1864 au 1er août 1866, se montent à la somme de $146.73, et de plus celle de $505 65 pour les cinq années d'intérêts échus le 27 juin 1882, en tout..... 652 38

"Que les intérêts sur la part du dit Firmin Dorion, du 29 mai 1865 jusqu'au 1er août 1866, se montent à la somme de $126.89 avec de plus celle de $505.65 pour les cinq années d'intérêts échus le 27 juin 1882, en tout 632 54

"Que les intérêts échus sur la part du dit appelant, du 3 novembre 1863 jusqu'au 1er août 1866, se montent à la somme de $231.00 avec de plus celle de $505.65 pour cinq ans d'intérêts échus le 27 juin 1882, en tout à..... 736 65

Lesquelles sommes forment celle de..... $2739 70

"De laquelle somme il faut déduire la somme de :—

1o. $58.33 étant pour cinq-sixièmes de celle de $70, que l'appelant a payée pour la rédaction

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de son compte ; 2o. Celle de $2000 que l'intimé s'est obligé de payer à l'acquit de l'appelant et pour laquelle somme il a produit un retraxit le 23 mars 1882 ; 3o. Celle de $155 pour intérêts accrus sur cette dernière somme à compter du 28 novembre 1879 au 27 juin 1882, ces trois sommes formant celle de..... 2213 33

Ce qui laisse une balance en faveur de l'intimé de..... $525 37

portant intérêt du 27 juin 1882, date de son intervention ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour en première instance le 9 juillet 1883 ;

" Cette Cour casse et annule le dit jugement du 9 juillet 1883, et procédant à rendre le jugement qu'aurait dû rendre la Cour de première instance, condamne l'appelant à payer à l'intimé, en son nom personnel et comme représentant les dits Charles Dorion, Eustache Dorion, Firmin Dorion et l'appelant, la dite somme de $525.37 avec intérêt sur icelle à compter du 27 juin 1882, et condamne de plus le dit appelant à payer à l'intimé les dépens encourus sur l'intervention du dit intimé et la contestation d'icelle ;

" Et la Cour condamne le dit intimé à payer à l'appelant les frais encourus sur cet appel ;

" Et la Cour ordonne de plus que le dossier soit transmis à la Cour de première instance pour y être ordonné à la diligence des parties qu'il sera fait emploi au nom de la substitution des sommes capitales que l'appelant a reconnu avoir entre les mains appartenant à la dite substitution, et suivant qu'il sera ordonné par la dite Cour de première instance ;

" Et cette Cour réserve au dit intimé le droit qu'il peut avoir de recouvrer de l'appelant les sommes qu'il a payées à son acquit au dit Sévère Dorion, fils, comme aussi elle réserve au dit appelant le droit qu'il pourrait avoir de répéter de l'intimé les sommes qu'il est condamné à lui payer par ce jugement pour et à raison des droits qu'il lui a cédés par acte du 20 décembre 1862, dans le cas où il

ferait annuler la dite cession, et réserve de plus aux appelés à la substitution les droits qu'ils pourraient avoir de contester le compte rendu en cette cause par l'appelant, ou de lui demander un nouveau compte des capitaux qu'il a eus entre ses mains appartenant à la dite substitution, et réserve encore à la Cour de première instance de faire droit sur les dépens encourus en Cour de première instance, autres que ceux encourus sur la dite intervention et contestation d'icelle."

(*Dissentiente*, l'Hon. M. le Juge Ramsay).

Jugement infirmé.

Madore & Bruchési, pour l'appelant.

Geoffrion, C.R., conseil.

Pagnuelo, Taillon & Gouin, pour l'intimé.

(E. L.)

November 27, 1885.

Coram DORION, C.J., MONK, CROSS, BABY, JJ.

REV. JOHN JONES ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

T. P. POWELL
(*Plaintiff in Court below*),
RESPONDENT.

Evidence—Valuation—Phosphate mine—Partnership account.

HELD:—That in order to determine, for the winding up of a partnership, the fair cash value of an asset of indefinite value, such as a phosphate mine, the Court will have regard to the estimate set upon it by persons experienced in the purchase and sale of mines, rather than to the opinion of witnesses who assign a speculative value to the property; and the fact that the mine could not be worked at a profit may also be properly taken into consideration.

The action was for an account of a partnership, and the

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judgment appealed from (Superior Court, Montreal, PAPINEAU, J.), condemned the appellants to pay the respondent $139.86, as the balance due.

The partnership was for the working of a phosphate mine, and the only points that remained to be determined were the value of the mine and of some implements and improvements. The value of the mine was variously estimated at from $200 to $6,000: The Court below placed the value at $2,000.

C. J. Doherty for appellant Jones.

J. S. Hall for appellant Hamilton.

Falconer for respondent.

CROSS, J.:—

On the 6th February, 1879, Powell brought an action against Jones and Hamilton, alleging that a partnership had existed between them and himself from January to the 15th July, 1877, for the ownership and working of a phosphate mine, from which considerable profits were realized, and about the last mentioned date Jones and Hamilton, now appellants, denied to Powell, the respondent, his rights as a partner, dissolved the partnership and expelled him therefrom and from access to the books and property of the firm, to his damage of $2,000; that he consented to the dissolution of the partnership as of the 15th July, 1877, and demanded an account of the assets and property of the mine and of the value of the mine itself, inasmuch as it had been retained by the appellants, and in default of such account that they should pay him $2,000.

Jones and Hamilton pleaded separately, but the same grounds of defence were urged by each, which were to the effect that they denied that any partnership had ever existed between them and Powell, but if it were decreed that such a partnership existed they were willing and offered to account, and tendered an account which showed a considerable loss by the working of the mine. After allowing for the advances made by each, and $800 as the value of the mine itself, the deficiency exceeded the sum of $1,600.

The issue was tried as to the existence of the partnership, and determined against the appellants, who were declared liable to account.

Powell thereupon proceeded to debate, that is, dispute, the accounts produced by each of the appellants, claiming that they should be reformed, and the appellants condemned to pay him $3,000. After evidence taken on this issue, the parties agreed on admissions, whereby, after allowing a sum agreed upon as expenditure, and a sum for proceeds, and putting down the value of the mine at $800, a deficiency was left to be made up of $1,600.41, all the rest being admitted save the value of the mine, together with some implements and improvements, which was left in dispute, to be determined on the evidence. If it remained at the figure set down by the appellants, Powell had nothing to receive, nor could he get anything, unless the mine and implements in use for working it, and improvements, were valued at a sum which, together with the $800 allowed, would show a surplus in the account in place of a deficiency.

The honorable the presiding judge in the Superior Court considered the evidence very conflicting as regards the value of the mine, and, in the absence of any certain *data* as a criterion, estimated it to be worth $2,000, and the implements, shop and wharf, viz., the improvements, to be worth $50, which would give a small sum to each of the partners of $139.86, being a third share of a surplus of $449.59 on the result of the working of the mine and the value of its property, allowing for the advances made by each partner.

We quite agree with the learned judge as to the conflicting nature of the evidence adduced, and admit that it is a subject of extreme difficulty to form a just estimate of the value, but we think that data and facts rather than the mere opinion of witnesses are the most reliable bases to guide the Court. McIntosh, the chief witness for Powell, estimates the mine to be worth $6,000, because he thinks it might have been sold for that sum, but it is not shown that anyone ever offered to purchase it at that

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sum or any other sum. He admits that it is impossible to give a definite value of any phosphate mine; it is just like buying a pig in a bag, and it is only in July, 1877, that he would have valued the mine in question at $6,000, and that not as intrinsic value, but for speculative purposes, in the hope that a purchaser could have been got who would pay more than was known to be its intrinsic value. Mr. Henshaw, examined on the same side, never saw the mine, but spoke of it on the evidence of McIntosh.

On the other side, a number of very competent witnesses value the mine at from $200 down to nothing. These include persons experienced in mining and in the purchase and sale of mines. They give as a reason that the mine could not be worked at a profit, that the owners were losing money by working it, and that better mines were sold at that time from $200 downwards.

In the face of this evidence, and considering that the estimate is to be made, not for a speculative purpose but for the winding up of a partnership, we think that a speculative value is inadmissible, and that the mine, at all events, was not worth sufficient to cover and make up for the deficit in the partnership account; that the intrinsic value of a mine that was only worked at a heavy loss, and the evidence showing that it is only workable at a loss, cannot be considerable, and should not be estimated on the speculative hope that some one ignorant of its value might be imposed upon, and thus a purchaser got at a figure which would show a surplus in the partnership accounts. If the respondent had thought it of considerable value he might have asked for its sale by licitation, which he has not done. We are of opinion that the respondent has not made good his *débats des comptes*, that his contestations should be overruled and dismissed, and that for this purpose the judgment appealed from must be reversed. It is needless to go into the question as to whether any balance is due to the appellants from the respondent; their account is held sufficient to compensate any claims or pretensions set up by the respondent.

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The following is the judgment:—

"Considering that the mine, implements and improvements whereof the value became in question in this cause, as decisive of the question whether the appellants owed the respondent a balance on the accounts of the partnership which had existed between them, were not proved to be, or to have been, worth sufficient to establish any such balance;

"Considering that the appellants sufficiently accounted for the affairs and the administration by them thereof, and of the property of the said partnership, and for the said property, and thereby showed that there was no balance coming or due to the respondent from said partnership;

"Considering that the respondent failed to sustain his *débats des comptes* in such manner as to show that any balance was coming or due to him by the appellants by reason of said partnership or the property thereof;

"Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court at Montreal on the 31st March, 1882, from which the present appeal has been brought, the Court of Our Lady the Queen now here doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth overrule and reject the *débats des comptes* made and produced in this cause by the respondent, with costs of the said Superior Court on the issues raised by said *débats des comptes*, and doth condemn the respondent to pay the appellants their costs on the present appeal."

Judgment reversed.

Doherty & Doherty, attorneys for appellant Jones.

Church, Chapleau, Hall & Nicolls, attorneys for appellant Hamilton.

Robertson, Ritchie & Fleet, attorneys for respondent.

(J. K.)

May 21, 1885.

Coram MONK, TESSIER, CROSS, BABY, JJ.

JOHN TYE
(*Defendant in Court below*),
APPELLANT;

AND

WARREN T. FAIRMAN
(*Plaintiff in Court below*),
RESPONDENT.

Sale—Misrepresentation as to part of thing sold—Damages.

The appellant sold to the respondent his assets, stock-in-trade, machinery, patents, by an agreement of which the material words are as follows:—"John Tye . . . hereby agrees to transfer and assign all his right "and interest in the assets and stock-in-trade and machinery of the "business carried on by him in Toronto and Montreal, under the "name of John Tye & Co., otherwise called the Dominion Wire "Mattress Company, to Warren T. Fairman, and also all the patents "used by said Tye in connection with said business... The consider-"ation of this transfer is $4,000, of which $2,000 are to be paid in "cash, $500 in three months, $500 in six months, $500 in nine "months and $500 in twelve months from this date, in notes of W. "T. Fairman..... If, on stock-taking, which shall be taken "within one week, it is found that $4,000 is not the exact valuation of "the property transferred, the parties shall regulate the deficiency or "excess as follows:—....if less than $4,000, then the deficiency shall "be deducted from the cash payment of $2,000." And in a post-"script it was stated that Tye "transfers to said Fairman the goodwill "of said business." On getting possession Fairman found that there was no existing patent in Canada for the process of wire coiling handed over to him by Tye in execution of the agreement, and that no patent could be obtained for it in Canada, inasmuch as application had not been made within a year from the date of the patent obtained in the United States. The stock-taking showed the value of the machinery and plant to be $1,920.89, leaving $2,000 to represent the value of the patents, or of the patents and goodwill.

HELD:—That the sale should not be regarded as a sale *en bloc*, and that there being deception and misrepresentation as regards the patents, which were, in fact, worthless, the purchaser was entitled to damages, the measure of which might be taken as the $2,000 allowed for the patents,—the good will having been added as a separate memorandum and nothing having been allowed as a consideration therefor.

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The appeal was from a judgment of the Superior Court, Montreal, (LORANGER, J,) Dec. 3, 1883, in the following terms :—

" Considérant que le demandeur allègue que le défendeur lui aurait vendu par écrit sous seing privé, le seize Mars, 1882, son fonds de commerce et les instruments et machineries servant à l'exploitation de ce commerce, qui consistait dans la manufacture de matelats en fil de fer ; qu'il aurait, par le même écrit, vendu au dit demandeur les patentes à son usage et employées par lui dans l'exercice de cette industrie ; Que le prix de vente aurait été de $4,000, dont une partie, savoir la somme de $2,000, représentait la valeur du fonds de commerce et des matériaux vendus, et la balance représentait la valeur d'une patente au moyen de laquelle le défendeur prétendait avoir le monopole absolu de la manufacture des dits matelats ; Que le demandeur aurait payé au défendeur une somme de $2,000 : et que la balance aurait été stipulée payable par billets de $500, chacun, à trois, six, neuf et douze mois ; Que deux de ces billets auraient été payés avant l'institution de l'action : que le défendeur aurait trompé le demandeur en se répresentant faussement comme propriétaire de la patente en question et comme possédant le droit exclusif de fabriquer et vendre les dits matelats ; que la prétendue patente n'avait jamais appartenu au défendeur, et que la fabrication des matelats en question se faisait dans la province d'Ontario, et ailleurs, par un grand nombre d'industriels ; que, sans la certitude d'obtenir le privilége exclusif et le contrôle que devait lui assurer la dite patente, le dit demandeur n'aurait pas acheté le fonds de commerce du défendeur, et le dit demandeur conclut à ce que le défendeur soit tenu de lui rembourser la somme de $3,000, qu'il a payées comme susdit et de lui remettre les deux billets non échus, tel que ci-dessus mentionné ;

" Considérant que le défendeur a plaidé qu'il n'a jamais vendu au demandeur le privilége exclusif de fabriquer et vendre les matelats en question ; que tout ce qu'il a vendu consiste dans le fonds de commerce qu'il possédait, et les avantages qui pouvaient en résulter au demandeur, pro-

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venant non seulement des patentes octroyées pour la fabrication des dits matelats, mais aussi des relations d'affaires que le défendeur lui-même s'était procuré dans le cours de son commerce ;

"Considérant qu'il appert par l'écrit produit, que le défendeur a vendu au demandeur tous ses droits et intérêts dans l'actif fonds de commerce et machineries composant le commerce qu'il tenait à Toronto et à Montréal sous le nom de 'John Tye & Co.' autrement désigné sous le nom de 'The Dominion Woven Wire Mattress Co.' et aussi toutes les patentes employées par le dit défendeur dans l'exploitation de ce commerce, le tout pour le prix de $4,000, payables en la manière ci-dessus énumérée ;

"Considérant que malgré que par l'écrit en question les parties n'ont fait aucune distinction entre la valeur du fonds de commerce, de la machinerie et des patentes, cependant il appert par l'inventaire produit exhibit No. 5 du demandeur que le matériel aurait été évalué à la somme de $1,920.89, et que la patente vendue au demandeur ainsi que *the good will of the business* auraient été évalués à la somme de $2,000 ;

"Considérant que la dite patente désignée sous le No. 10,334 faisait l'objet principal de la transaction intervenue entre le demandeur et le défendeur, le commerce ainsi vendu au demandeur ne pouvant être exploité qu'au moyen de la dite patente ;

"Considérant que la patente consiste dans un instrument faisant partie de la machine qui servait à la manufacture des matelats en fil de fer, c'est à-dire l'instrument connu sous le nom de "Pig-tail," lequel instrument était adapté à la dite machine, et était lors de la vente en question à l'usage du défendeur, lequel s'en servait pour l'exploitation de son industrie ;

"Considérant qu'il est en preuve que le défendeur n'a point livré au demandeur la partie de la dite machine ainsi couverte par la dite patente, mais a livré en son lieu et place un autre instrument également propre à la fabrication des dits matelats, mais à l'usage d'autres industriels ;

"Considérant que le demandeur est en droit de réclamer

la livraison entière de toutes les parties du mécanisme couvertes par la patente en question et sur refus du défendeur de le faire, de demander le remboursement des sommes qu'il a ainsi payées pour la dite patente ;

" La Cour condamne le défendeur à payer au demandeur la somme de $2,000, avec intérêt, etc."

T. P. Butler, for appellant :—

The honorable judge sitting in the court below has, in his final judgment, held that the purchase price, though a block sum, is divisible into two parts, $1920.89 representing the value of the stock in trade and the other $2000 representing *the value of the patent and the goodwill of the business.* If we admit the divisibility of the block sum, there is no separation of the values of the goodwill and of the patent—there is no attempt to prove any value of either, separately, by the plaintiff, while the defendant has proved—and no evidence is brought to rebut this proof—that he was doing a good paying business, which had been established for some years both in Montreal and Toronto ; and that the plaintiff stated distinctly, that it was the business he wanted, and not the patent.

Hutchinson was heard on the part of the respondent.

CROSS, J. :—

The appeal is from a judgment awarding damages for deception and breach of contract.

The appellant Tye sold out his business (the manufacture of mattresses) to Fairman, with the patents used by him, Tye, in connection with his business. He claims that the patent delivered to him (known as the pigtail) was not the patent in use by Tye at the time of the sale ; that what was in use was identical with a device that had been patented in the United States, but which could not be patented in Canada ; he, Fairman, consequently could not have a monopoly as had been promised him and having been deceived by Tye's misrepresentations was entitled to be indemnified in damages.

Tye by his plea contended that the writing executed

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between him and Fairman contained the entire of their conventions relative to the sale of the business, all of which had been fulfilled. That he had made no misrepresentations to induce Fairman to purchase the patents and business; the transaction took place at the solicitation of Fairman, to whom Tye sold the business, good will and letters patent; the business was a profitable one and worth the price agreed upon; Tye never pretended that he had the sole right to manufacture woven wire mattresses; Fairman knew this, and that others were engaged in the business; that no question was made of patent or monopoly at the time of the agreement, Fairman stating that it was the business he wanted, and did not care about the patent, which, however, was valid.

Proof was adduced consisting of the agreement and the testimony of witnesses at great length on both sides, besides the report of a professional expert appointed by the court to answer certain questions propounded to him. The judgment which followed on the merits condemned Tye to pay $2,000 damages, which judgment is the subject of the present appeal at the instance of Tye.

The bargain was contained in a *sous seing privé* document, of date May 16, 1882, by which Tye sold to Fairman all his (Tye's) right and interest in the assets and stock-in-trade and machinery of the business carried on by him, called the Dominion Wire Mattress Company, and also *all the patents used by said Tye in connection with said business.* The consideration was $4,000, whereof $2,000 to be paid in cash and the balance by instalments. Stock to be taken within a week, and if $4,000 was found not to be the exact valuation of the property transferred, the parties were to regulate the deficiency or excess as follows:—if in excess, Fairman was to give a thirty-days note; if less, the deficiency was to be deducted from the cash payment of $2,000.

A postcript was added to declare that Tye would not by himself or his sons enter into the like business for ten years to come, and that he transferred the good will of the business to Fairman.

Stock was taken in detail, showing the valuation of machinery, plant and stock to be $1,920.89. An entry was added as follows:—" Goodwill of the business and the assignment of patent 10,334, registered at the Ottawa Patent Office, called Moody improved wire-coiling machine, $2,000."

A further memorandum was signed, dated May 19, 1882, stating that Edward Hunt, of London, Ont., had the right to use the machines covered by No. 10,334, and to canvass for orders for wire mattresses west of Toronto.

An assignment was subsequently executed by Tye to Fairman of patent No. 10,334.

These documents go to show that the sale could not be considered to be one *en bloc*; but rather one based on specific detailed values, in which the patents to have been transferred represented $2,000, and the remaining detail $1,920.89. It has been contended that the goodwill of the business was estimated and went to make up this round sum of $2,000; but it will be seen by the manner in which the document of sale was drawn, that the patents only were included in the estimate as stated in the principal document, and when the good will was added by a separate memorandum, nothing was allowed as a consideration therefor. The sum of $3,920.89 consequently represented the entire value put upon the machinery, stock-in-trade, and patents.

Fairman entered into possession, and pursuant to a clause in the agreement, Tye remained with him for some time on wages, to instruct Fairman and his servants in the use of the wire-coiling machines.

Fairman pretended, and alleged in his declaration, that he was deceived by misrepresentations made to him by Tye, that the patents he would transfer practically gave him (Fairman) a monopoly of the business, as they were for the exclusive manufacture of coiled wire for mattresses. This was no doubt going further than the law warranted, if even such misrepresentations had been made, but it would at all events have warranted Fairman in believing that he would have such monopoly, unless

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and until some one insisted on his selling the patent machines at a fair figure; and he would at all events have the monopoly of the sale of the patent machines. The question at issue is reduced down to one of fact, as to whether misrepresentations were really made by Tye to Fairman to induce the latter to enter into an agreement which he never would have made, unless deceived and misled by mispresentations of Tye.

The proof cannot be said to be very satisfactory, but it has been found by the judge of the Superior Court to meet the exigency of the case, and we have not been able to come to the conclusion that he was mistaken. It runs to the effect that after Fairman got fully into possession, he found that other parties were using the same process for the coiling of wire as that which had been handed over to him by Tye, and on enquiry he found that there was no existing patent whatever in Canada for the process of wire coiling handed over to him by Tye in execution of the agreement; moreover, that no patent could be obtained for it in Canada inasmuch as a patent had not been applied for in Canada, within a year from the time it had been patented in the United States, as required by the Canadian statute to entitle the owner to obtain a patent in Canada; moreover, that the patent which Tye had obtained in Canada was for a particular process called the pigtail, in connection with a machine which had not been in use by Tye, nor delivered over nor used by Fairman under his agreement of purchase, and which he, Fairman, considered absolutely useless; therefore, not having got a patented machine with exclusive privileges, according to his agreement and the representations made to him, but only an unpatented machine which every one who chose might use, he was not bound to pay the price, or should be indemnified in damages for this breach of the contract.

An attempt was made to show that the machine with the pigtail attachment had really been in use by Fairman, and was as good if not a better machine than the other, but it cannot be said to have been successful, and

the fact is strongly brought out in Fairman's evidence, that the machine really in use when he got possession, and in the use of which he was instructed by Tye, was not the one with the pigtail appliance patented under No. 10,334, but the Moody machine patented only in the United States, and wholly unpatented and not susceptible of being patented in Canada, and therefore evidently not the machine Fairman relied upon, or had reason to rely upon, as well from the terms of the contract as from the representations made to him. With regard to these representations it may be said that they are not wholly uncontradicted, but very strong proof of them is made, and the weight of the proof seems to be in favor of the respondent. It was so found in the court below, and we do not see that there is room for reversing this conclusion. The professional expert, too, found that the Moody machine referred to as the one patented in the United States and not in Canada, and in use by Fairman under his agreement of purchase, is in no way covered, protected, or secured by the patent No. 10,334 which is applicable to the machine with the pigtail appliance.

On the whole, the majority of the court think it their duty to confirm the judgment of the Superior Court, and it is accordingly confirmed.

Judgment confirmed, Tessier, J., *diss.*

T. P. Butler, Attorney for Appellant.

Macmaster, Hutchinson & Weir, Attorneys for Respondent.

(J. K.)

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—— 2. *Usage of Trade*]. An alleged usage of trade, imposing the obligations incurred under the first bill of lading upon the carrier who accepts a cargo carried to an intermediate port to forward it to its final destination by an additional transit, so as to require such ultimate carrier to procure the surrender of the original bill of lading to free himself from responsibility, could not alter the established significance of the documents used, or the legal relations of the parties according to the facts of the case, or make liability depend upon obtaining the surrender of a document after it had exhausted its efficiency. *Ib.* 75.

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1. *Jury Law*]. The Parliament of Canada, in declaring, by 32 & 33 Vic. c. 29, s. 44, that "every person qualified and summoned as "a Grand Juror, or as a Petty Juror, in criminal cases, according "to the laws which may be then in force in any Province of "Canada, shall be and shall be held to be duly qualified to serve "as such juror in that Province, etc.," did not legislate *ultra vires;* and the Jury Act of the Province of Quebec is constitutional. *Reg.* v. *Provost*, 477.

—— 2. *License for Storage of Gunpowder*]. The Act 41 Vict. (Q.) c. 3, s. 170, which imposes a penalty for failing to take out a license, is not *ultra vires*, being in the nature of a police regulation, and as such within the powers of the Local Legislature, even supposing the provision of the Act requiring a fee of $50 to be paid for a license were *ultra vires* as a revenue tax. *Hamilton Powder Co. & Lambe*, 460.

—— 3. *Nuisance—Chimney sending out smoke in hurtful quantity*]. While the local legislatures have no jurisdiction to deal with an indictable misdemeanor, that being a matter of criminal law assigned exclusively to the Parliament of Canada; they have authority to legislate for the prohibition of things hurtful to public health not matter for indictment at common law, such as factory chimneys "sending forth smoke in such quantity as to be a nuisance." The local legislatures possess this power as coming under "municipal institutions," under B. N. A. Act, s. 92, No. 8; and the fact that a term of the criminal law ("nuisance") is used in a local Act to characterize an offence within the jurisdiction of the local legislatures does not make the enactment *ultra vires* so long as the offence is not *per se* an indictable offence under the criminal law. *Pillow & City of Montreal*, 401.

—— 4. *Tax on Commercial Corporations*]. The taxes imposed on commercial corporations by 45 Vict. (Q.) ch. 22, are direct taxes, and authorized by the B. N. A. Act, sect. 92, s.s. 2; and even if not direct taxes, they would be valid under sect. 92, s.s. 16 as matters of a merely local or private nature in the Province. *North British and Mercantile Ins. Co. & Lambe*, 122.

CONTRACT.

1. *Lease of Steam Power*]. A contract of lease of steam power to the extent of six horse power, *held*, not violated by subletting a portion of the motive power,—there being no more power used than was mentioned in the lease, and no prohibition against subletting. *Sharpe et al. & Cuthbert et al.*, 479.

CONTRACT—*Continued.*

—— 2. *Rescission for Fraud—Rights of Innocent Third Party.*] The rescission, on the ground of fraud, of a deed transferring real estate, will not affect the rights of a third party who in good faith has lent money on the property while in the possession of the purchaser, where the vendor, by his own act or fault, has to some extent induced the third party to make the advance. So, where the plaintiff sold certain real estate to defendant (who then obtained an advance from C. on the security of the property), and in the deed from plaintiff to defendant it was declared that the consideration was cash paid by the purchaser, whereas, in fact, the consideration was mining stock which turned out to be worthless, it was held that the plaintiff was in fault in permitting and requesting such mis-statement as to the consideration to be inserted in the deed, which mis-statement might to some extent have induced C. to advance money on the property; and therefore the plaintiff was entitled to obtain the rescission of the deed only on condition of reimbursing to C. the amount of his advance. *Lighthall & Craig*, 275.

—— 3. *Substantial Compliance.*] *See* SHIPPING, 264.

—— 4. *Time for fulfilment.*] M., against whom a *capias* had issued, deposited a cheque in the hands of appellants, the agreement being that if he appeared with his bail at their office by eleven o'clock on the following morning the cheque was to be returned; if he did not appear, the cheque was to be applied to the payment of debt and costs. There was a conflict of evidence as to whether M. appeared at eleven or a few minutes later, and (as the majority of the Court viewed the evidence) one of the bondsmen agreed upon was not present. *Held* (by the whole Court), that a difference of a few minutes in a contract of this nature was too slight to be material, and would not have justified the application of the cheque to the payment of the debt and costs, if M. had appeared with his bail as agreed: but (by the majority of the Court) the absence of one of the bondsmen was a non-compliance with the agreement, which justified the application of the cheque to the payment of the debt and costs. *Macmaster et al. & Moffatt*, 387.

CORPORATION.

1. *Fine—C.C.P.* 1025.] The fine which a corporation may be condemned to pay under Art. 1025 C.C.P. is payable one-half to the Crown and one-half to the petitioner. *The Montreal, Portland & Boston Ry. Co. & Hatton*, 351.

—— 2. *Subscriber before incorporation.*] The appellant signed an undertaking to take stock in a company to be incorporated by letters patent under 31 Vict. (Q.) c. 25, but was not a petitioner for the letters patent, nor was his name included in the list of intending shareholders in the schedule sent to the Provincial Secretary with the petition. The appellant's name was not mentioned in

CORPORATION—*Continued.*

the letters patent incorporating the company, nor did he become a shareholder at any time after its incorporation. *Held*, that the appellant never became a shareholder of the company, and could not be held for calls on stock. *Arless & Belmont Manufacturing Co.*, 340.

—— 3. *Who are shareholders.*] Under the terms of 31 Vict. (Q.) cap. 25, the only persons who are shareholders in a company incorporated thereunder are those named in the letters patent as such, and those who become members after incorporation. *Ib.* 340.

COSTS.

Privilege.] Where a defendant, in an action of damages which has been dismissed with costs, causes an immovable belonging to the plaintiff to be seized and sold by the sheriff, he is entitled to be collocated by privilege for such costs, on the proceeds of the sale. *Tansey & Bethune*, 28.

CRIMINAL LAW.

1. *Evidence—Perjury.*] The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the defendant is alleged to have given false testimony, is not material where the assignment of perjury has no reference to the pleadings; but the defendant, if he wishes to do so, may, in case the plea be not produced, prove its contents by secondary evidence. Further, it is not essential to prove that the facts sworn to by the defendant, as alleged in the indictment, were material to the issue in the cause in which the defendant was examined. *Reg.* v. *Ross*, 227.

—— 2. *Indictment for robbery.*] In an indictment against two or more persons for robbery, of whom only one is present for trial, the omission of the word "together" is immaterial. *Reg.* v. *Provost*, 477.

—— 3. *New trial*]. A new trial may be ordered on a Reserved Case, in misdemeanors, where it appears to the Court on the evidence that an injustice may have been done to the defendant. *Reg.* v. *Ross*, 227.

—— 4. *Reserved Case*]. A Reserved Case may be amended at the request of the defendant, during the argument thereon before the full court, by adding the evidence taken at the trial. *Ib.* 227.

—— 5. *Reserved Case*]. Where a Case Reserved for the consideration of the Court of Queen's Bench, pursuant to the Statute in that behalf, does not contain a question which, in the opinion of the full Court, it is essential to decide in connection with such case, it may be sent back to the Court which reserved the same, for amendment. *Regina* v. *Provost*, 473.

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1. *Breach of Contract*]. Nominal damages may be awarded for breach of contract without proof of actual damage. *La Corporation du Comté d'Ottawa & La Compagnie du Chemin de Fer de Montréal, Ottawa et Occidental*, 46.

—— 2. *Default to issue debentures*]. The obligation of a municipality to issue debentures in payment of a subscription of shares in a railway is not to be regarded as equivalent to a mere obligation to pay money, in which case under C.C. 1077, the damages resulting from delay would consist only of interest from the day of default. *Ib.* 46.

—— *See* MASTER AND SERVANT, 252, 280, 290.

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EDUCATIONAL INSTITUTION.

Exemption from Taxes]. A school for the education of young ladies, kept by a private individual, and not under public control, is not an "educational institution" within the exemption of 41 Vict. (Q.), c. 6, s. 26. *Wylie & La Cité de Montréal*, 367.

EVIDENCE.

1. *Servitude.*] The existence of a *héritage dominant* not mentioned in the deed under which a right of servitude is claimed cannot be established by parol evidence. *Mondelet & Roy*, 9.

—— 2. *Trial for Perjury.*] *See* CRIMINAL LAW, 227.

—— 3. *Valuation of Property.*] In order to determine, for the winding up of a partnership, the fair cash value of an asset of indefinite value, such as a phosphate mine, the Court will have regard to the estimate set upon it by persons experienced in the purchase and sale of mines, rather than to the opinion of witnesses who assign a speculative value to the property; and the fact that the mine could not be worked at a profit may also be properly taken into consideration. *Jones & Powell*, 499.

EXECUTION. *See* PROCEDURE, 436.

EVOCATION—*Privilege for hearing. See* PROCEDURE, 394.

EXEMPTION FROM TAXES.

See EDUCATIONAL INSTITUTION, 367.

EXPROPRIATION.

See MUNICIPAL LAW, 238; RIPARIAN PROPRIETOR, 425.

FABRIQUE.

1. *Authorization to sue.*] The ordinary bureau of a *fabrique* may authorize actions for the recovery of the ordinary revenues of the *fabrique*, and for a *titre nouvel*. This authorization need not be special: a general authorization to take legal proceedings against those who are indebted to the *fabrique*, without specifying the name of each debtor, is sufficient. *Les Curé et Marguilliers de l'Œuvre et Fabrique de Varennes & Choquet*, 333.

—— 2. *When absence of authorization cannot be invoked.*] The absence of authorization to appeal in an action by a *fabrique* cannot be invoked at the hearing in appeal, when it was not invoked in the course of the procedure, and the attorneys for the appellant were not put in default to produce their authorization. *Ib.* 333.

FRAUDULENT DEED.

Rescission of.] Real estate estimated to be worth about $1,200 was sold to a person without means, for a consideration stated in the deed to be $3,650. No money was paid and the vendors remained in possession. The vendee executed a deed of obligation and hypothec in favor of the vendors for the unpaid instalments. Two of these instalments, amounting to $2,000, were subsequently transferred by the vendors to W. in payment of goods. *Held*, that the sale of the property and the hypothec in favor of the vendors being simulated and fraudulent, W. was entitled to have the said deed set aside as regards him (the vendee being made a party to the suit), and to ask that the vendors be condemned to pay for the goods as his personal debtors. *Black et al. & Walker*, 214.

See CONTRACT, 275.

HYPOTHEC.

Rente Constituée.] Since the coming into force of the Civil Code the *tiers détenteur* of an immoveable charged with the payment of a *rente constituée* created for the payment of the price, is not personally responsible for the payment of the *rente*. *Wright & Moreau*, 456.

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INSOLVENT ACT OF 1875.

Official Assignee continued as Creditor's Assignee.] Where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have appointed him assignee to the estate without exacting any further security, and while acting as assignee of

INSOLVENT ACT OF 1875—*Continued.*

the creditors he makes default to account for monies of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee. *Dansereau & Letourneux*, 357.

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Interest on interest.] The obligation to pay interest on interest from the time money is received is incumbent only on those who receive money for *incapables*. *Dorion & Dorion*, 483.

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JUDICIAL ADMISSION.

Divisibility.] The *a veu* of a party who admits the receipt of a sum of money sued for, but who pretends that he received it as a gift and not as a loan, may be divided when such pretention appears wholly improbable in view of the circumstances of the case and the character of the parties. And the admission thus divided may serve as a *commencement de preuve par écrit* to establish the real facts. *La jeunesse & Latraverse*, 321.

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LEASE OF STEAM POWER. *See* CONTRACT, 479.

MASTER AND SERVANT.

1. *Defective tackle.*] An employer is responsible for injuries to his employees resulting from defects in the tackle, machinery, or appliances provided for their use. Tackle used in work such as loading or unloading a vessel ought to be amply sufficient to withstand any strain that is likely to be put upon it by ordinary unskilled laborers; and where tackle breaks without any extraordinary strain upon it, it will be presumed to be insufficient, though it may have been used previously for the same purpose without accident. *Ross & Langlois*, 280.

—— 2. *Degree of care.*] A laborer engaged in such work as loading or unloading a vessel is only bound to use ordinary care, and the employer is not relieved from responsibility by showing that if the laborer had used the greatest skill and care the accident might not have happened. *Ib.* 280.

MASTER AND SERVANT—*Continued.*

—— 3. *Injury to fellow servant.*] An employer is responsible for any want of care on his part by which his servant is injured; and, therefore, if he engages an unskilled or careless person, and owing to the negligence or unskilfulness of such person a fellow-workman is injured, the employer is responsible. But in order to render the employer responsible, it must be clearly established that the injury was due to the negligence or want of skill of the fellow-workman. So, where the plaintiff and a superior workman were engaged in an operation not shown to be hazardous, and an explosion occurred which killed the superior workman and injured the plaintiff who was assisting him, it was held that the employer was not responsible, in the absence of any evidence as to the cause of the accident or to show that the superior workman was careless or unskilful. *The St. Laurence Sugar Refining Co. & Campbell*, 290.

—— 4. *Servant engaged in ordinary duties.*] Where a servant is injured while engaged in the ordinary duties of his employment, and the accident is not the result of any fault or negligence on the part of the employer or of those for whom he is responsible, there is no action against the employer. *La Compagnie de Navigation du Richelieu & Ontario & St. Jean*, 252.

MUNICIPAL LAW.

1. *Action against Secretary-Treasurer.*] An action by the Superintendent of Education does not lie under s. 22 of 40 Vict. (Q.) c. 22, s. 22, against the secretary-treasurer of a school municipality after he has rendered his account and it has been approved at a regular meeting of the ratepayers and also by the trustees. *Ouimet & Normandin*, 107.

—— 2. *City of Montreal—Expropriation.*] Under the Statute 31 Vict. (Q.) ch. 37, it was necessary that the commissioners appointed to carry out an expropriation and to determine the parties interested therein and to be assessed for the proposed improvement, should give public notice of their proceedings, and in the absence of such notice, the assessment roll made by the Commissioners was null and void. *Hubert & City of Montreal*, 238.

—— 3. *City of Montreal—Taxes on real estate.*] Municipal taxes imposed on real estate in the city of Montreal are not payable day by day, but are indivisible, and are due by those who are the owners of the property at the time the taxes are imposed. A person who had merely a promise of sale, without being the owner or occupier of the property taxed, was not bound to take any notice of an assessment illegally imposed. *Hogan & The City of Montreal*, 60.

—— 4. *Collection Roll.*] The formalities prescribed by the Municipal Code with reference to a collection roll must be strictly followed, and where such formalities have not been observed, the taxes thereby imposed are not exigible, and a sale of land for arrears of such pretended taxes will be annulled. *La Corporation du Village du Bassin de Chambly & Scheffer*, 42.

MUNICIPAL LAW—*Continued.*

—— 5. *Collection Roll—Acquiescence.*] Where the taxes are illegal in consequence of there being no valid collection roll in existence, acquiescence will not give validity to such assessment. *Ib.* 42.

—— 6. *Local Municipalities.*] Under the Municipal Code, Art. 19, §3, local municipalities include village municipalities. Art. 27 of the Municipal Code merely indicates what rural municipalities shall be considered local municipalities, without reference to village municipalities, which fall under the general rule of Art. 19, §3. Consequently, a company duly incorporated under 33 Vict. c. 32, had a right to stone a front road within the limits of a village municipality, to put up gates and collect tolls. *La Compagnie du Chemin de Péage de la Pointe Claire & Leclerc*, 296.

—— 7. *Tolls*]. Under the said Act, such company is entitled to exact toll for a fraction of a mile, provided that on the whole length of road the tariff does not exceed the amount fixed by Schedule B of said Act. *Ib.* 296.

—— 8. *Power to License and Regulate*]. Power granted to a municipal corporation to license and regulate a particular business does not authorize the exaction of a revenue duty, but only of a moderate fee sufficient to cover the cost of issuing the licenses, and of inspecting and regulating the same. So, where the City of Montreal was empowered to license and regulate junk stores, it was held that the exaction of a license fee of $50 per annum was illegal. *City of Montreal & Walker*, 469.

—— 9. *Procès-verbal*]. Although it is within the attributes of municipalities to make by-laws and *procès-verbaux* for the opening of water-courses, and a person injured thereby may have exercised his right of appeal to the county council, and the *procès-verbal* has been confirmed by the county council, nevertheless such confirmation is not a bar to an action to set aside the *procès-verbal* on the ground that it orders something illegal to be done. And so, where the effect of a water-course established by *procès-verbal* was to aggravate greatly the servitude which the plaintiff's land had to bear, owing to its being lower than that of his neighbours, it was held that he was entitled to bring suit to have the *procès-verbal* set aside, although he had previously appealed to the county council, and the *procès-verbal* had been confirmed thereby. *Corporation de la Paroisse de Ste. Anne du Bout d'Isle & Reburn*, 200.

—— 10. *School Commissioners*]. Under the provisions of 45 Vict. (Q.), c. 29, s. 2, and arts. 346 *et seq.* of the Municipal Code, contestations of elections of School Commissioners should be brought before the Circuit Court or Magistrate's Court, which have exclusive jurisdiction in these matters. The recourse by writ of *quo warranto* under C. S. L. C., c. 15, s. 40, is abolished; and even if it existed still, the mere election of persons as school commissioners without their having assumed to exercise the office, would not justify the issuing of a *quo warranto*. *Metras & Trudeau*, 347.

NEGLIGENCE. *See* MASTER AND SERVANT, 252, 280, 290.

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PENAL ACTION.

1. *Affidavit must identify action*]. In the affidavit required for a penal action under 27 & 28 Vict. (Q.), cap. 43, the cause of action must be indicated sufficiently to identify the action sworn to with that actually prosecuted as specified in the declaration. *Sipling & The Sparham Fire Proof Roofing Co.*, 22.

—— 2. *Insufficient identification*]. A reference, in the affidavit required for a penal action by 27 & 28 Vict. (Q.), cap. 43, to the action mentioned in the præcipe "herewith filed," is not a sufficient identification of the action sworn to with that actually prosecuted as specified in the declaration. *Reed & The Sparham Fire Proof Roofing Co.*, 26.

PERJURY. *See* CRIMINAL LAW, 227.

POWDER MAGAZINE.

Powder Manufactory]. A powder manufactory, where a quantity of powder exceeding 25 lbs. is kept, is a powder magazine within the meaning of 41 Vict. (Q.), cap. 3, sect. 170. *Hamilton Powder Co. & Lambe*, 460.

PRESCRIPTION.

1. *Interest before and after the Code*]. Under C. C. 2250 and 2270, interest accrued before August 1, 1866, date when the Civil Code came into force, is prescribed only by thirty years, and interest accrued since that date is prescribed by five years. *Dorion & Dorion*, 484.

—— 2. *Intervention.* Where an action to set aside an assessment roll has been brought before the expiration of the delay fixed by a statute for contesting assessment rolls, the right of an intervenant taking the same conclusions as those of the original action is not prescribed though the delay have expired before the filing of the intervention. *Hubert & City of Montreal*, 237.

PRIVILEGE.

1. *Preference of Builder.*] Under C. C. 2013, a builder who has complied with the formalities prescribed by the article has a privilege only on the additional value given to the property by the buildings erected thereon, and not on the *fonds* of the property. *Séminaire de St. Hyacinthe & La Banque de St. Hyacinthe*, 396.

—— 2. *Preference of Builder—Registration.*] The registration of the *procès-verbal* required by C. C. 2013 for the preservation of the privilege does not create a tacit hypothec on the immoveable in favor of the builder. *Ib.* 396.

PRIVILEGE—*Continued.*

3. *Preference of Crown—Law regulating.*] The privilege of the Crown for its claims over those of private competing creditors is governed by the civil law of the province of Quebec, derived from France, and not by the law of England. *Reg. & The Exchange Bank of Canada*, 302.

—— 4. *Preference of Crown—Extent of.*] Under C. C. P. 611, in the absence of any special privilege, the Crown has a preference over chirographic creditors for monies due to it by a bank in liquidation. *Ib.* 302. (Reversed by Privy Council, Feb. 18, 1886.)

—— 5. *Preference of Crown—Holders of bank notes.*] The holders of notes of an insolvent bank, being accorded by statute a special privilege, take precedence of the Crown. *Ib.* 302.

See COSTS, 28; TITHES, 37.

PRIVILEGED HEARING. *See* PROCEDURE, 394.

PROCEDURE.

1. *Action to account.*] Where a defendant sued in an action to account for the administration of real estate, and for a sum claimed on the sale of the said property under a special agreement, pleads to the first part of the action that he has never been put in default to render an account, but has always been ready to do so, and produces an account with his plea; and pleads to the second part of the action, that he owes nothing under the agreement alleged, the account produced will not be rejected on motion as irregularly and prematurely filed. Such account will not be rejected on motion before *enquête* because the chapter of expenses contains items which do not appear to have any connection with the administration of the property. *Dorion & Dorion*, 65.

—— 2. *Appeal—Acquiescence.*] A letter written by one of the defendants in an hypothecary action to the plaintiff's attorneys after the rendering of the judgment, which condemned them as joint undivided owners of an immovable to abandon it or pay the plaintiff's claim, and before the institution of the appeal, asking for delay until said defendant could get his *garans* to pay the claim, and promising to settle with the plaintiff if the *garans* did not, constituted an acquiescence in the judgment *a quo* on the part of said defendant, and his appeal would be dismissed on motion. The other defendant was not bound by this acquiescence, as it did not appear that any partnership existed between him and his co-defendant (beyond the joint ownership of the immovable in question), or that he had authorized the writing of the said letter. *Dickson et al. & Galt*, 373.

—— 3. *Appeal—Interlocutory Judgment.*] The appeal from a final judgment of the Superior Court brings up all the interlocutory judgments rendered in the cause, and the neglect by a defendant to file an exception to an interlocutory judgment dismissing his *exception à la forme* does not prevent him from discussing this judgment on the appeal from the final judgment, the interlocu-

PROCEDURE—*Continued.*

tory not being *chose jugée* on the questions raised by his exception to the form. *Metras & Trudeau*, 347.

—— 4. *Appeal to Supreme Court*]. No appeal lies to the Supreme Court from a judgment in appeal confirming a judgment of the Superior Court granting an injunction, but reserving to adjudicate as to the amount of damages until after an account had been rendered. *Whitehead & White*, 482.

—— 5. *Execution—Sale of defendant's effects.*] Where a judgment creditor has caused the seizure and sale of a portion of the defendant's effects, sufficient to cover his claim as stated in the writ of execution, he cannot subsequently, upon a mere allegation that the defendant is insolvent, and that oppositions *afin de conserver* have been filed by other creditors, obtain an order for an *alias* writ of execution, for the purpose of seizing and selling the remainder of the defendant's effects. *Bury & Samuels*, 436.

—— 6. *Hearing by Privilege—Execution*]. An appeal from a judgment of the Superior Court pronouncing upon the validity of an evocation from the Circuit Court to the Superior Court may be heard by privilege, the rule being that every case which must be proceeded with in a summary manner in the Superior Court may also be proceeded with summarily in appeal. *Coursol & Les Syndics de la Paroisse de Ste. Cunégonde*, 394.

—— 7. *Inscription for enquête*]. It is not competent to any party in a cause to inscribe for the adduction of evidence at length, without the consent of all the parties. *Exchange Bank of Canada* v. *Craig*, 39.

—— 8. *Intervention*]. Where an action has been brought by one of several persons assessed for the cost of a special improvement, to set aside the assessment roll, any other person assessed for the cost of the same improvement has an interest which entitles him to intervene if the original plaintiff abandons the case. *Hubert & City of Montreal*, 237.

—— 9. *Judgment of distribution—C. C. P.* 761]. A person whose claim against an immoveable seized and sold by the sheriff appears in the registrar's certificate, but has not been collocated in the report of distribution, and who has failed either to contest the report of distribution or to appeal from the judgment homologating the same, or to present a *requête civile* or an opposition against such judgment, as required by C. C. P. 761, cannot, by direct action, recover the amount of his claim from the party collocated in such report to his prejudice. *McDonell & Buntin*, 1.

PROCÈS-VERBAL. *See* MUNICIPAL LAW, 200.

PROMISE OF SALE. *See* MUNICIPAL LAW, 60.

PROVINCIAL JURISDICTION.

See CONSTITUTIONAL LAW, 122, 401, 460, 477.

QUI TAM ACTION. *See* PENAL ACTION, 22, 26.

RENTE CONSTITUEE. *See* HYPOTHEC, 456.

RESERVED CASE. *See* CRIMINAL LAW, 227, 473.

RAILWAY BONDS.

Default to hand over]. Where the defendant wrongfully retained certain railway bonds and the judgment ordered him to restore them, the condemnation against him in default of giving over the bonds, should be to pay the actual value thereof at the time he got them as established in evidence, and not the par or face value. *Senécal & Hatton*, 112.

RAILWAY COMPANY.

1. *Damage caused by sparks from locomotive.*] A railway company is responsible for damages caused by sparks from its locomotives, notwithstanding the fact that the company has complied with all the requirements of the law, and has used the most approved appliances to prevent the escape of sparks. *La Compagnie du Grand Tronc & Meegan*, 364.

2. *Person injured on track.*] No presumption of fault arises against a railway company from a person being injured on the track; on the contrary, it is for the person injured to show that he had a lawful right to be there; and to enable him to claim damages he must also show that the company were guilty of some fault, neglect or imprudence whereby the injury was caused. So where the plaintiff was injured at a street crossing, and it appeared there was a signboard indicating the crossing, and that the bell was rung and the whistle sounded to warn passers of the approaching train, it was held that the plaintiff could not claim damages from the company. *Roy & La Compagnie du Grand Tronc*, 353.

RESPONSIBILITY OF EMPLOYER. *See* MASTER AND SERVANT.

REVENDICATION—*By unpaid vendor. See* SALE, 326.

RIPARIAN PROPRIETOR.

Expropriation.] A proprietor whose land extends to the beach of the River St. Lawrence, within the limits of the Harbour of Montreal, has not such a distinct and independent right of easement or servitude in the river frontage as is susceptible of being valued separately and apart from the compensation awarded for the property itself when the latter is expropriated for public purposes. The inconvenience of being excluded from easy access to the river is merely an element to be considered by the arbitrators when estimating the indemnity to be awarded for the property expropriated. *Starnes & Molson*, 425.

2. Even if the riparian proprietor expropriated possessed such easement or servitude, the functions of the arbitrators would not extend to the valuation of such right, unless it were included in the notice or demand of expropriation. *Ib.* 425.

ROAD. *See* MUNICIPAL LAW, 296.

ROBBERY, INDICTMENT FOR. *See* CRIMINAL LAW, 477.

SALE.

1. *Fear of disturbance.*] The question whether the buyer has just cause to fear disturbance and is entitled to ask security under C. C. 1535, is a discretionary matter, in which the Court of Appeal will be little disposed to reverse the decision of the Court below; but when the Court below has condemned the vendor to give security without determining the duration of such security, the Court of Appeal will amend the judgment in this respect. *Biron & Trahan*, 247.

—— 2. *Misrepresentation.*] The sale under the terms of the agreement (for which see head note on p. 504) was not a sale *en bloc*, and there being deception and misrepresentation as regards one of the things sold, the purchaser was entitled to damages. *Tye & Fairman*, 504.

—— 3. *Unpaid vendor.*] The provisions of Art. 1998 C. C., restricting the exercise of the vendor's privilege to fifteen days following the sale in cases of insolvency, apply not only to cases of insolvency under an insolvent act, but to insolvency under the common law, when a trader ceases to make his payments. When the vendor is entitled to revendicate, he may legally, with the purchaser's consent, take back the goods without a proceeding in revendication. The expression "fifteen days after the sale" in Art. 1998 refers to the perfected sale, and if goods are sold by weight, number or measure, and not *en bloc* (C. C. 1474), the delay to revendicate will only begin from the time they have been weighed, counted or measured. *Thibaudeau & Mills*, 326.

SCHOOL COMMISSIONERS. *See* MUNICIPAL LAW, 347.

SCHOOL MUNICIPALITY. *See* MUNICIPAL LAW, 107.

SECURITY IN APPEAL.

Alternative Condemnation.] On an appeal by the defendant from a judgment ordering a railway company to call the annual meeting within one month, or in default to pay a fine of $2,000, security for costs only is insufficient: the security must be to satisfy the condemnation. *Montreal, Portland & Boston Ry. Co. & Hatton*, 72.

SEIGNIORIAL ACT OF 1854. *See* SERVITUDE, 9.

SERVITUDE.

1. *Destination made by Proprietor.*] As regards servitudes, the destination made by the proprietor is equivalent to a title, only when it is in writing, and the nature, the extent and the situation of the servitude are specified. *Fisher & Evans*, 415.

—— 2. *Extent, how determined.*] The use and extent of a servitude are determined according to the title which constitutes it; so, where E. acquired four houses "with the servitude of hidden drains "underneath the yards," and it appeared that a drain had been constructed to conduct the sewage of the four houses in question, as well as of the adjoining corner house, to the street drain, it was held that the deed did not give any right of servitude in the portion of the drain under the yard of the adjoining corner house, this not being mentioned in the deed, and not being included in the description given therein. *Ib.* 415.

SERVITUDE—*Continued.*

—— 3. *Right of Passage—Aggravation.*] The owner of cultivated land, in selling two lots therefrom, established a servitude of passage on foot and for vehicles in favor of these lots on another portion of the land, with a stipulation that the gates should be kept shut. On one of the lots so sold, a coal oil refinery, and on the other an abattoir were subsequently erected, and for the carrying on of these industries the owners of the lots used the passage daily for the entrance and exit of a large number of cattle and vehicles, so that the gates were always open. *Held*, that under the circumstances there was an aggravation of the servitude within the terms of C. C. 558, and that the proprietor of the *fonds servant* was entitled to ask damages for the abuse of the right of passage, and a prohibition against its use for the purposes of the industries in the future. *McMillan & Hedge*, 376.

—— 4. *Seigniorial Act—Personal Obligation.*] By deed of partition in 1811 between the proprietors *par indivis* of a seigniory, it was agreed that they should not erect any grist or saw mill for their private advantage on their respective portions, within a circuit of a league from the mills then existing on the seigniory. In 1850, the representative of one of the parties sold a portion of the seigniory with the stipulation that the purchasers and their representatives should at no time erect on the said lot any flour or grist mill. *Held*, 1. That the deed of 1811 created a *servitude réciproque* in favor of the domain of each share of the divided seigniory. 2. If this servitude was seigniorial, it was abolished by the Seigniorial Act of 1854, whether it be considered as a principal right or as an accessory of the right of *banalité*. 3. If it was not seigniorial it was constituted in favor of a seigniory, and it disappeared by the concession of the real estate in favor of which it was created. 4. The deed of 1850 created only a personal obligation, no *héritage dominant* being mentioned in it. *Mondelet & Roy*, 9.

See MUNICIPAL LAW, 200; RIPARIAN PROPRIETOR, 425.

SHAREHOLDER. *See* CORPORATION.

SHIPPING.

1. *Charter Party.*] The appellant, in January, 1879, agreed to charter a steamship, for the carriage of live cattle to England, and the conditions of the charter-party were that the steamship should proceed to Montreal with all convenient speed, to arrive there 'between' the opening of navigation in 1879, and thereafter to run regularly between Montreal and London, and to be dispatched from Montreal in regular rotation with other steamers to be chartered up to 1st October, 1879. Navigation opened at Montreal about 1st May, but the steamship did not arrive there until 5th June, when the appellant refused to load. *Held*, that there was not a substantial compliance with the contract on the part of the ship, and that the appellant was entitled to throw up the charter party. *McShane & Henderson*, 264.

SHIPPING—*Continued.*

—— 2. *Charter-Party—Demurrage—Dead Freight.*] The charter-party provided that the ship was to be loaded "as fast as can be received "in fine weather, and ten days' demurrage over and above the "said lying days, at forty pounds per day. The ship to have an "absolute lien on the cargo for all freight, dead freight and de- "murrage due under this charter-party, but charterers' responsi- "bility to cease upon shipment of the cargo, provided the cargo "be worth the freight, demurrage, etc., on arrival at the port of "discharge. Should ice set in during loading so as to endanger "the ship, master to be at liberty to sail with part cargo and to "have leave to fill up at any open port on the way homeward "for ship's benefit." *Held* (Cross, J., diss.), that notwithstanding the clause as to ship having leave to fill up at other ports on the homeward voyage, the shipowner was entitled to dead freight, owing to the setting in of ice having occasioned the departure of the vessel before the loading was completed, the completion of the loading having been retarded and prevented by the fault of the charterer. *Lord et al. & Davison*, 445.

SUBSCRIPTION TO STOCK. *See* CORPORATION, 340.

SUBSTITUTION.

1. *Capital Sums.*] The curator to a substitution has no right to receive the capital sums belonging to the substitution, which should be employed in accordance with C. C. 931. *Dorion & Dorion*, 483.

—— 2. *Interest.*] The curator is not entitled to claim the interest on the capital sums, the interest being due to the *grevés*. *Ib.* 483.

SUPERINTENDENT OF EDUCATION. *See* MUNICIPAL LAW, 107.

SURETYSHIP. *See* INSOLVENT ACT OF 1875, 357.

TAX. *See* MUNICIPAL LAW, 60, 469; CONSTITUTIONAL LAW, 122; EDUCATIONAL INSTITUTION, 367.

TITHE.

1. *By whom due.*] The tithe is due by the person who reaped the grain, and not by him who merely threshed and fanned it. *Gaudin & Ethier*, 37.

—— 2. *Privilege for.*] The privilege of the *curé* for the tithe exists on the crop so long as it remains in the possession of the person who reaped it, but is lost so soon as without fraud it has passed into the hands of a purchaser in good faith for valid consideration. *Ib.* 37.

TOLL. *See* MUNICIPAL LAW, 296.

TROUBLE. *See* SALE, 247.

UNPAID VENDOR. *See* SALE, 326.

VALUATION. *See* EVIDENCE, 499.

WATER COURSE. *See* MUNICIPAL LAW, 200.

WORDS. DIRECT AND INDIRECT TAXATION, 122; EDUCATIONAL INSTITUTION, 367; NUISANCE, 401; POWDER MAGAZINE, 460.

PRIVILEGES AND HYPOTHECS—*Continued.*

—— 4. *Improvements.*] A clause of a deed of sale *à réméré* by which the vendor stipulates that the purchaser shall complete the works in progress on the immoveable sold, will not prevent the purchaser when sued hypothecarily, from claiming a privilege for improvements. *Leprohon* v. *DeBellefeuille*, 156.

—— *See* REGISTRATION, 242; PROCEDURE, 443; LIEN, 419.

PROBABLE CAUSE. *See* MALICIOUS PROSECUTION, 338.

PROCEDURE.

1. *Action not returned on the original return day.*] When an action is not returned on the return day, and the plaintiff takes a new writ, this cannot be considered as an *alias* writ, and must be stamped to the same amount as the first. Insufficiency of stamps renders the writ null, and the action may be dismissed *sauf recours* on exception to the form. *Rimdeau* v. *Casey*, 391.

—— 2. *Action qui tam—Affidavit.*] The nullity or insufficiency of the affidavit required for an action *qui tam* may be invoked at any stage of the case. *Matte* v. *Davis*, 218.

—— 3. *Action qui tam—Insufficiency of affidavit.*] The affidavit for an action *qui tam* must identify the cause of action. *Ib.* 218.

—— 4. *Affidavit for capias.*] The allegation in an affidavit for capias "que le défendeur a caché, soustrait et recelé ses biens, et est sur le point de cacher *ou* soustraire et receler ses biens avec l'intention de frauder ses créanciers en général *ou* le demandeur en particulier," is sufficient. *Senécal* v. *Hart*, 371.

The allegation "que le défendeur est sur le point de quitter immédiatement la Province du Canada, comprenant les Provinces de Québec et d'Ontario, avec l'intention de frauder *ses* créanciers en général *ou* le demandeur en particulier," is sufficient. *Ib.* 371.

—— 5. *Affidavit for capias.*] An affidavit is insufficient which alleges that the defendant is about to depart from "the province of Quebec," *Maury* v. *Durand*, 347.

—— 6. *Amendment.*] Where a party obtains leave to make an important amendment, the other side should always have permission to plead to such amendment, and therefore it is irregular to allow an important amendment at the final judgment. *Pauzé* v. *Senécal*, 465.

—— 7. *Amendment of pleadings.*] After a plaintiff has proceeded at *enquête*, he will not be permitted to amend his answer to plea, by offering to compensate claims set up by defendant by an additional account then for the first time produced by the plaintiff. *Lalonde* v. *Rochon*, 435.

—— 8. *Amendment of writ of summons.*] The amendment of a writ of summons by the substitution of a new defendant for one named in the writ, will not be permitted. *Chisholm* v. *Langlois*, 190.

—— 9. *Appearance.*] An appearance not served upon the plaintiff's attorneys is irregular and has no effect. *Pipe* v. *Crevier*, 230.

—— 10. *Bill of Particulars.*] In an action of damages for personal injuries the defendant before pleading is entitled to obtain particulars of the injuries complained of. *Lemieux* v. *Phelps*, 305.

PROCEDURE.—*Continued.*

—— 11. *Calling in real plaintiff.*] Where it appears on the record that the plaintiff has transferred his rights, the defendant may obtain a suspension of proceedings until the transferee, the real plaintiff, be called in. *Bondy* v. *Valois*, 236.

—— 12. *Capias—Affidavit.*] A single affidavit containing the necessary allegations, suffices for the issue of a *capias* and *saisie-arrêt* before judgment in the same cause. *St. Michel* v. *Vidler*, 163.

When by his declaration on the *saisie-arrêt* the plaintiff merely asks that this demand be joined to the principal action of capias, the defendant cannot plead separately to each. *Ib.* 163.

—— 13. *Capias—Declaration.*] Even where the plaintiff has already issued a *saisie-arrêt* before judgment, accompanied by a declaration, a *capias* issued in the same cause, and for the same reasons, should also be accompanied by a declaration. *Morandat* v. *Varet*, 109.

—— 14. *Capias—Delay.*] The delay for filing an exception to the form in an action of capias runs only from the day of return mentioned in the writ, and not from the day when the writ was returned under an order of a judge. *Morandat* v. *Varet*, 109.

—— 15. *Capias founded in part on judgment.*] A capias may issue in a separate action for a debt composed in part of the amount of a judgment previously obtained against the defendant. *Senécal* v. *Hart*, 371.

—— 16. *Costs.*] Where a wife was trading in her husband's name, and her opposition to a seizure against the husband was, after contestation, maintained, she was nevertheless condemned to pay her own costs. *Van de Vliet* v. *Feniou*, 216.

—— 17. *Costs.*] Where the claim of an intervenant, in an action of *saisie-revendication* to some of the effects seized, is admitted by the plaintiff, the intervenant is not entitled to costs of intervention against plaintiff, but only against defendant. *Dupaul* v. *Wheeler*, 147.

—— 18. *Costs.*] The costs of a factum in which judges are mentioned with disrespect, will not be allowed. *Nadeau* v. *St. Jacques*, 302.

—— 19. *Costs.*] The distraction of costs in favor of the attorney does not prevent the party represented by him from taking execution to collect such costs from the party condemned to pay them, especially where the attorney has been already paid the costs by the party so proceeding. *Bissonette* v. *Dunn*, 235.

—— 20. *Execution—Notice of sale.*] A notice of sale of moveables under execution, in which a wrong number is given as the defendant's domicile, is irregular; but in such case the Court will permit the notices to be renewed, without setting aside the seizure. *Dorion* v. *Diette*, 31.

—— 21. *Execution—Salary of teacher.*] The provisions of 38 Vic. (Q.) ch. 12, subjecting a portion of the salaries of public employees to seizure, do not apply to the salaries of teachers under the control of the School Commissioners, which are exempt from seizure. *Lovejoy* v. *Campbell*, 77.

PROCEDURE—*Continued.*

—— 22. *Execution—Tavern License.*] A license to sell intoxicating liquors cannot be seized under an execution. *Van de Vliet* v. *Feniou*, 216.

—— 23. *False arrest.*] The defendant in an action of damages for false arrest cannot justify himself by alleging acts of the plaintiff subsequent to those which served as the basis of the criminal proceeding. *Bogue* v. *Brouillet*, 470.

—— 24. *Experts, Visit of.—Action for personal injuries.*] In an action of damages for personal injuries, the defendant before pleading may ask that a physician be appointed to ascertain and report to him upon the nature of the injuries. *Lemieux* v. *Phelps*, 305.

—— 25. *Foreclosure.*] Where the defendant has been foreclosed from pleading, and has allowed the plaintiff to proceed with his proof *ex parte*, he cannot afterwards obtain leave to plead—on the ground that the plaintiff did not file a detailed statement of his demand until after demand of plea—without paying the costs occasioned by his default. *Lavallée* v. *Letourneux*, 492.

—— 26. *Incidental demand.*] Where the plaintiff in an action of damages for libel, after answering specially, makes an incidental demand for additional damages for libellous allegations in the plea, it is sufficient to refer to the special answer, without setting out the libellous allegations in the incidental demand. *Laflamme* v. *The Mail Printing Co.*, 359.

—— 27. *Inconsistent pleading.*] The irregularity of pleading compensation and litispendence in the same plea should not be attacked by an answer-in-law. *Picard* v. *Bérard*, 454.

—— 28. *New Trial.*] Insufficiency of damages is not a proper ground for ordering a new trial (more particularly in actions of slander or libel), where it does not appear that the jury were improperly influenced or led into error. *Dixon* v. *The Mail Printing Co.*, 480.

—— 29. *Inscription.*] When the defendant has pleaded an exception *à la forme*, then a *défense en droit*, the plaintiff cannot inscribe on law until the exception *à la forme* has been disposed of. *Lachambre* v. *Normandin*, 241.

—— 30. *Judgment of distribution.*] Art. 751 C. C. P., which allows a judgment of distribution to be contested even after its homologation, must be interpreted strictly. It applies only to cases where the sum collocated is not due, and not to those where it is a question of privilege or preference. *Petit dit Lalumière* v. *Crevier*, 313.

—— 31. *Liquidator of insolvent company.*] Notwithstanding Sect. 33 of 45 Vic. (D.) ch. 23, the liquidator of an insolvent company may take proceedings in his own name with the addition of his quality, as well as in his mere quality of "liquidator to the company." *La Banque d'Hochelaga* v. *Masson*, 62.

—— 32. *Notice of motion.*] Notice of motion served on the 11th for the 12th is insufficient. *La Banque d'Hochelaga* v. *Masson*, 62.

33. *Notice of taxation.*] Under 479 C. C. P., where the prothonotary or his deputy has taxed the costs without previous notice to the attorneys of the parties in the case, an opposition *afin d'annuler*, on the ground only of want of notice, will not be maintained,

PROCEDURE.—*Continued.*

unless the opposant shows that he has been prejudiced by the want of notice. *Samuel* v. *Houliston*, 505.

—— 34. *Pleading—Demurrer.*] A demurrer to a demurrer is inadmissible. *La Cie. de Prêt et Crédit Foncier* v. *Lemire*, 464.

—— 35. *Privilege for costs.*] The plaintiff's privilege for the costs of suit (under C. C. P. 606, § 8) includes the costs incurred up to final judgment in appeal. *Elliot* v. *Lord*, 443.

—— 36. *Provisional Execution.*] When in a *saisie-revendication*, the plaintiff has obtained an order from a judge of the Superior Court, granting him possession of the effects seized during the pendency of the suit, and another party in the case has appealed from this order, the plaintiff may obtain provisional execution notwithstanding the appeal. *Whitehead* v. *Kieffer*, 287.

—— 37. *Report of Experts.*] The Court will not be disposed to reject a report of experts for irregularities where the parties are not prejudiced thereby. *Cannavan* v. *Bryson*, 221.

—— 38. *Report of Experts.*] When the *jurat*, declaring that the expert was sworn, has been lost, and is not annexed to his report, the report may be amended, with the permission of the Court, so as to enable the expert to put in an affidavit to the effect that he was duly sworn before acting. *Silcot* v. *Papineau*, 297.

—— 39. *Reprise d'instance.*] A *reprise d'instance* may be made by motion as well as by petition. *La Banque d'Hochelaga* v. *Masson*, 62.

—— 40. *Revision as to costs.*] A judgment may be revised on a mere question of costs, and a party who has been unsuccessful as to all the facts attempted to be proved will be condemned to pay the costs of the *enquête*, though he otherwise succeeds in obtaining judgment. *Filiatrault* v. *Elie*, 66.

—— 41. *Right to plead de novo.*] Where an action is instituted against two persons in partnership, and desisted from as to one of them, the other is entitled to plead *de novo*, and to have the costs on the *désistement* paid before he does so. *Chisholm* v. *Langlois*, 192.

—— 42. *Saisie-arrêt.*] Where a garnishee has been ordered to pay over a sum of money to the plaintiff, he cannot afterwards deposit it in Court, on the ground that a *tierce opposition* has been filed, asking that the money be divided *au marc la livre*. *DeBellefeuille* v. *Ross*, 318.

—— 43. *Saisie-revendication.*] A voluntary guardian who has left the defendant in possession of the things seized, may seize them by *saisie-revendication* when he has good reason to fear that they are in danger of disappearing, and the defendant refuses to give them up. *Dupaul* v. *Wheeler*, 147.

—— 44. *Saisie-revendication.*] The plaintiff in an action of revendication may, on leave granted by the Court, amend the description of the effects seized, even before the return day, on giving notice to the other parties. *Legru* v. *Dufresne*, 315.

—— 45. *Saisie-revendication—Contempt.*] When, in a *saisie-revendication*, the Court has granted the plaintiff possession of the effects seized, the forcible removal of these effects by another party in the case is a contempt of court. *Whitehead* v. *Kieffer*, 288.

PROCEDURE—*Continued.*

—— 46. *Security for costs.*] A non-resident plaintiff who contests an opposition *afin de distraire* is not required to give security for costs of the contestation under C. C. 29. *Park* v. *Rivard*, 291.

—— 47. *Service in Court House.*] The service of a writ of summons or other proceeding may be made in a Court room, if the Court be not then in session. *Hus* v. *Charland*, 126.

—— 48. *Service of Judgment.*] When a judgment orders the delivery of certain goods within 15 days from the rendering of the judgment, and, in default of so doing, to pay a specified sum of money, service of the judgment is not necessary, the party condemned being put in default by the mere lapse of the 15 days. *Samuel* v. *Houliston*, 505.

—— 49. *Tender with special answer.*] A tender and deposit made with a special answer to a plea have no effect in the cause, if the special answer has been dismissed on a replication in law. *Brosseau* v. *Brosseau*, 307.

—— *See* MONTREAL, CITY OF; ELECTIONS ACT (QUEBEC CONTROVERTED); EVOCATION, 214; LICENSE ACT (QUEBEC) of 1878; MINOR, 223.

PROMISSORY NOTE. *See* BILLS AND NOTES, 319.

PROXIES. *See* CORPORATION, 5.

PUBLIC OFFICER.

Notice of action.] When a public officer is sued, not for an act done by him in the exercise of his functions, but for omission to do something which he was bound to do, he is not entitled to a month's notice of action. *Jodoin* v. *Archambault*, 323.

QUALITY TO SUE. *See* ACTION, 166, 322.

RAILWAY COMPANY.

1. *Lands necessary for construction.*] Under the Quebec Railway Act companies acquire the ownership of lands necessary for their line by marking them on the plans prescribed by the Act and paying the indemnity settled by the arbitrators, and owners cannot refuse to cede their property. Proprietors who have permitted the company to take their lands have only a right to the indemnity. *La Banque d'Hochelaga* v. *M. P. & B. Ry. Co.*, 150.

—— 2. *Possession.*] When a contractor for a railway agrees to build a road and to buy the necessary lands in the name of the company, the possession he obtains is not his own, but that of the company. *La Banque d'Hochelaga* v. *M. P. & B. Ry. Co.*, 150.

—— 3. *Responsibility for damage caused by sparks.*] A railway company is responsible for damages resulting from fire caused by sparks from a locomotive, although all possible precautions have been taken. *Jodoin* v. *La Cie. du Chemin de Fer du Sud-Est*, 316.

—— 4. *Responsibility—Imprudence of passenger.*] A railway company is bound to stop at the places for which it has sold tickets and col-

RAILWAY COMPANY—*Continued.*

lected fares and is responsible for failure to do so; but if in such case a passenger jumps off the train while it is in motion and is injured, he is guilty of imprudence which may be taken into consideration in diminution of damages. *Lareau* v. *Central Vermont Railroad*, 433.

—— *See* CARRIER, 168; PRIVILEGES AND HYPOTHECS, 146.

RECORDER'S COURT. *See* CERTIORARI, 237.

REGISTRATION.

In what cases renewal is necessary.] Renewal of registration when a *cadastre* comes into force is required only for hypothecs and other real rights upon a property, *jus ad rem*, and not for a right of property, *jus in re*. *Surprenant* v. *Surprenant*, 242.

REGISTRAR.

Tariff.] A registrar, when furnishing to a sheriff a certificate as to several lots of land sold, is not entitled to make separate certificates for each lot sold, when but one requisition covering all has been filed with him by the sheriff. *Morris* v. *Canadian Iron and Steel Co.*, 426.

RÉMÉRÉ. *See* SALE, 360.

REPRISE D'INSTANCE. *See* PROCEDURE, 62.

RESPONSIBILITY. *See* CARRIER, 168; RAILWAY COMPANY, 316, 433; MONTREAL, CITY OF.

REVENDICATION. *See* PROCEDURE, 315; POSSESSION, 382.

REVIEW.

1. *Judgment not final.*] A judgment rendered in an action of revendication, granting a petition of plaintiff under C. C. P. 869, to have delivery of the goods on giving security, is not a final judgment subject to be reviewed. *Whitehead* v. *Kieffer, and White*, 141.

—— 2. *Upon question of costs.*] Where the adjudication as to costs in the judgment below involves a violation of principle, the Court of Review may revise it upon this question alone. *Lamarche* v. *La Banque Ville-Marie*, 203.

—— 3. *Contestation of municipal election.*] A final judgment rendered by the Superior Court on a petition contesting a municipal election, is not susceptible of revision, not being appealable. *Beauchemin* v. *Hus*, 413.

—— *See* PROCEDURE, 66.

SAISIE-ARRET. *See* EVIDENCE, 124; PARTNERSHIP, 193, 366, 367.

SALARY OF SCHOOL TEACHERS. *See* PROCEDURE, 77.

SALE.

1. *By prête-nom.*] Whatever may be the understanding between the owner of certain moveables and a *prête-nom*, the sale made by the latter in his own name to a third party in good faith, is valid, and the owner cannot impugn it, even though the buyer may have known at the time the quality of the *prête-nom*. *Whitehead* v. *Kieffer*, 284.

SALE—*Continued.*

—— 2. *A rémeré—Notice.*] In the case of a sale *à réméré*, when the delay for the exercise of the right is to run only from the completion by the purchaser of certain improvements on the property sold, the purchaser is bound to notify the vendor of the termination of the works, and the delay runs only from such notice. *Fournier* v. *Leger*, 360.

—— 3. *Of claims not yet matured.*] Claims not yet matured may be validly transferred, and even where the transfer is made as collateral security, the creditors of the transferor cannot ask to be collocated *au marc la livre*. *DeBellefeuille* v. *Ross et vir*, 212.

—— 4. *Refusal of purchaser to accept.*] Where a person who purchased a bankrupt stock from the assignee and made a payment on account of the price, subsequently (on a pretence which he failed to prove) refused to accept the goods or to pay the balance of the price; *held*, that the vendor was entitled to resell the goods at the purchaser's risk, and to set off the deficit against the payment on account. *Desmarais* v. *Picken*, 185. Confirmed in Review, 476.

—— 5. *Time of essence of contract.*] Where by the contract the defendant was bound to deliver fifty tons of hay as required up to 1st May, *held*, that the stipulation as to time was of the essence of the contract, and that defendant could not be compelled to deliver after 1st May. *Larin* v. *Kerr*, 374.

—— *See* CORPORATION, 1; SUBSTITUTION, 131.

SCHOOL TEACHER—*Exemption of salary from seizure. See* PROCEDURE, 77.

SECURITY FOR COSTS.

1. *Plaintiff leaving province during suit.*] Where the plaintiff leaves the Province during the suit, the defendant is entitled to ask for security for costs, and the motion may be made even after the expiration of four days after the defendant had knowledge of the plaintiff's departure. *Cyr* v. *Bryson*, 495.

—— 2. *Extent of.*] When the plaintiff leaves the province during the suit, the defendant is entitled to security not only for the costs yet to be incurred, but also for all costs already incurred. *Gauthier* v. *Dupras*, 510.

—— 3. *Prête-nom.*] The fact that a person resident in the Province of Quebec, and who sues there, is only a *prête-nom* for a person resident outside of the Province, is not sufficient to make the plaintiff liable to give security for costs. *Reed* v. *Rascony*, 431.

—— *See* PROCEDURE, 291.

SEIGNIORY.

1. *Droit de commutation.*] The *droit de commutation* on immovables situate in the seigniories belonging to the Séminaire de St. Sulpice, within the limits of the ancient parish of Montreal, is payable on the first mutation, by whatever title. *DeBellefeuille* v. *Dorsennens*, 278.

—— 2. *Property sold by sheriff's sale.*] When a property in these seigniories subject to commutation is sold by sheriff's sale, the seigniors have a right to file an opposition *afin de conserver*; but

SEIGNIORY—*Continued.*

they should in the first place ask to have the value of their *droit de commutation* fixed by arbitration, the price of adjudication not serving as a basis. *Ib.* 278.

—— 3. *Legacy or Succession.*] When in these seigniories the *droit* opens by legacy or succession, it is payable only ten years after the death of the person from whom the immoveable is transmitted, *i.e.* between the heirs and the Seminary; but this delay does not apply to third parties. *Ib.* 278.

SEPARATION DE BIENS.

Obtained in France.] A separation as to property obtained in France, will have force in this Province, but the requirements of our law as to registration of traders must be complied with. *Goudron* v. *Lemonier*, 160.

SEPARATION DE CORPS. *See* EVIDENCE, 80.

SERVICE IN COURT HOUSE. *See* PROCEDURE, 126.

SEWERS. *See* MONTREAL, CITY OF, 300.

SERVITUDE.

Land enclavé.] In order that land may be considered enclosed on all sides within the meaning of C. C. 540, it is necessary that there should be no issue whatever to the public road. A mere undisputed *chemin de tolérance* is sufficient to prevent the owner from claiming a right of way across his neighbour's land. *Mainville* v. *Legault*, 295.

SHERIFF'S SALE.

1. *Description of property.*] In the advertisement of sheriff's sale of part of an immoveable bearing an official number, it is necessary to state the properties conterminous thereto. *Cité de Montréal* v. *Lionais*, 511.

—— 2. *Subdivision of lots.*] Although a block of land may have been subdivided on the official plan, the sheriff is not bound to sell the official sub-divisional lots separately, if they have not been defined on the ground and if the land is used as a whole; and he may be ordered by a judge in chambers to seize and sell the land as a whole. *Gale* v. *Canadian Iron and Steel Co.*, 441.

—— 3. *Tariff.*] If a block of land composed of several sub-divisional lots is seized and sold as one, the sheriff is not entitled to charge the 50 cents per extra lot provided for by the tariff for extra lots. *Gale* v. *Canadian Iron and Steel Co.*, 442.

—— 4. Where the *adjudicataire* knows at the time of the sale that the property is charged with a dower claim, he cannot ask subsequently to have the sale annulled on the ground that such claim exists. *Lizotte* v. *Deschenaux*, 402.

STENOGRAPHER'S FEES.

Responsibility of parties.] The party employing a stenographer is relieved from all liability for his fees, when he deposits the amount thereof in the hands of the prothonotary. *Morris* v. *Currie*, 258.

SUBSTITUTION.

1. *Sale of substituted property.*] According to the law which existed in France anterior to the ordinance of 1747, (being that which was introduced into Canada,) any *grevé* might, with judicial authorization, sell the property of the substitution, for urgent cause, and such alienation was final. *Caty* v. *Perrault*, 131.

—— 2. Before the ordinance of 1747, the presence of the tutor or curator to the substitution, at a sale of the property of minors, was sufficient; the concurrence of a tutor to the substitutes then born was not required. *Ib.* 131.

—— 3. *Term "children."*] The expression "children," in a donation creating a substitution in their favor, includes the "grand children," in the absence of any express limitation in the deed in favor of the children only. *Joubert* v. *Walsh*, 85.

SUCCESSION.

1. *Rights of Legatees.*] The assets of an insolvent succession are not the *gage* of the creditors in preference to the special legatees, so as to enable the creditors to prevent the special legatees from taking possession of their legacies. If there must be a reduction of the special legacies in order to pay the testator's debts, the creditors have an action against the special legatees to obtain the reduction; but they cannot ask that all the assets of the testator be placed in the name of the curator appointed to the insolvent succession. *La Banque Ville-Marie* v. *Rocher*, 409.

—— 2. *Vacant Succession.*] The renunciation of the sole universal legatee does not render the succession vacant if there are other heirs. *Ib.* 409.

A curator named to a succession vacant by the renunciation of the legatees or heirs has only the rights which the heirs or legatees would have had. *Ib.* 409.

—— 3. *Usufructuary.*] The universal legatee or donee *en usufruit* is personally liable to the creditors for the debts of the succession, even capital sums, and the contribution to such debts by the *nus-propriétaires* does not prevent the recourse of the creditors. *Boileau* v. *Seers*, 239.

—— 4. *Support and education of child.*] The father is liable for the support and education of his child, and neither he nor his representatives can oppose an amount disbursed for these objects in compensation of a debt due to the child. *Ib.* 239.

SURETY.

1. *Composition and discharge.*] In a case of composition and discharge between a debtor and his creditors, where the deed is made by the creditors, not to give the amount of their claims to the debtor, but because they cannot obtain more, the *caution solidaire* is not discharged. *Leclaire et al.* v. *Forest*, 113.

—— 2. *Rights against principal debtor.*] A person who becomes liable *in solido* for another, with his consent, may, even before the maturity of the debt, without having paid the creditor, sue the principal debtor if he becomes insolvent, or, in a case of lease, if he be removing furniture from the leased premises; and if he does not

SURETY—*Continued.*

take any action, he cannot oppose the exception of discussion when sued by the creditor. *Laurent* v. *Paquin*, 344.

—— 3. *Woman as surety.*] A woman who is of age and not *sous puissance de mari* is *contraignable par corps*, and may be received as *caution judiciaire*. *Slessor* v. *Desilets*, 306.

TAX—*Direct and Indirect.* *See* CONSTITUTIONAL LAW, 32.

TUTORSHIP.

1. *Alien.*] An alien cannot be appointed tutor or curator. *Driscoll* v. *O'Rourke*, 311.

—— 2. *Complaint of administration.*] Where minors after they have become of age, have accepted the account of their tutor, and given him a discharge, they cannot afterwards complain of his administration. *Hodgson* v. *La Banque d'Hochelaga*, 18.

—— 3. *Grounds of exclusion.*] Age may be a reason for not accepting the office of tutor, but is not a ground of exclusion. *Lebeuf* v. *Daoust*, 227.

—— 4. *Incapacity.*] Incapacity, to be ground for exclusion from tutorship, must be such as to render the person unfit to conduct business. *Lebeuf* v. *Daoust*, 227.

UNION OF CAUSES. *See* ACTION QUI TAM, 461.

USUFRUCTUARY. *See* SUCCESSION, 239.

VACANT SUCCESSION. *See* SUCCESSION, 409.

VALUATION.

Annual revenue.] In estimating the value of a bridge for purposes of expropriation, the annual revenue of the property should be taken into consideration. *Jones* v. *Laurent*, 438.

VOTER—*Qualification.* *See* ELECTION ACT (QUEBEC), 308.

WARRANTY.

1. A person who transfers a note insufficiently stamped is not bound to guarantee the bearer, the defect being apparent. *Lamarche* v. *La Banque Ville-Marie*, 203.

—— 2. When the transferee of a promissory note calls his transferor *en garantie* on the plea of one of the endorsers that he is discharged, he is entitled to ask that the price paid by him be returned to him, and what has been paid him by the other endorser cannot be deducted; but, in his turn, he must offer to put the *cédant* in the position in which he was before the transfer. *Ib.* 203.

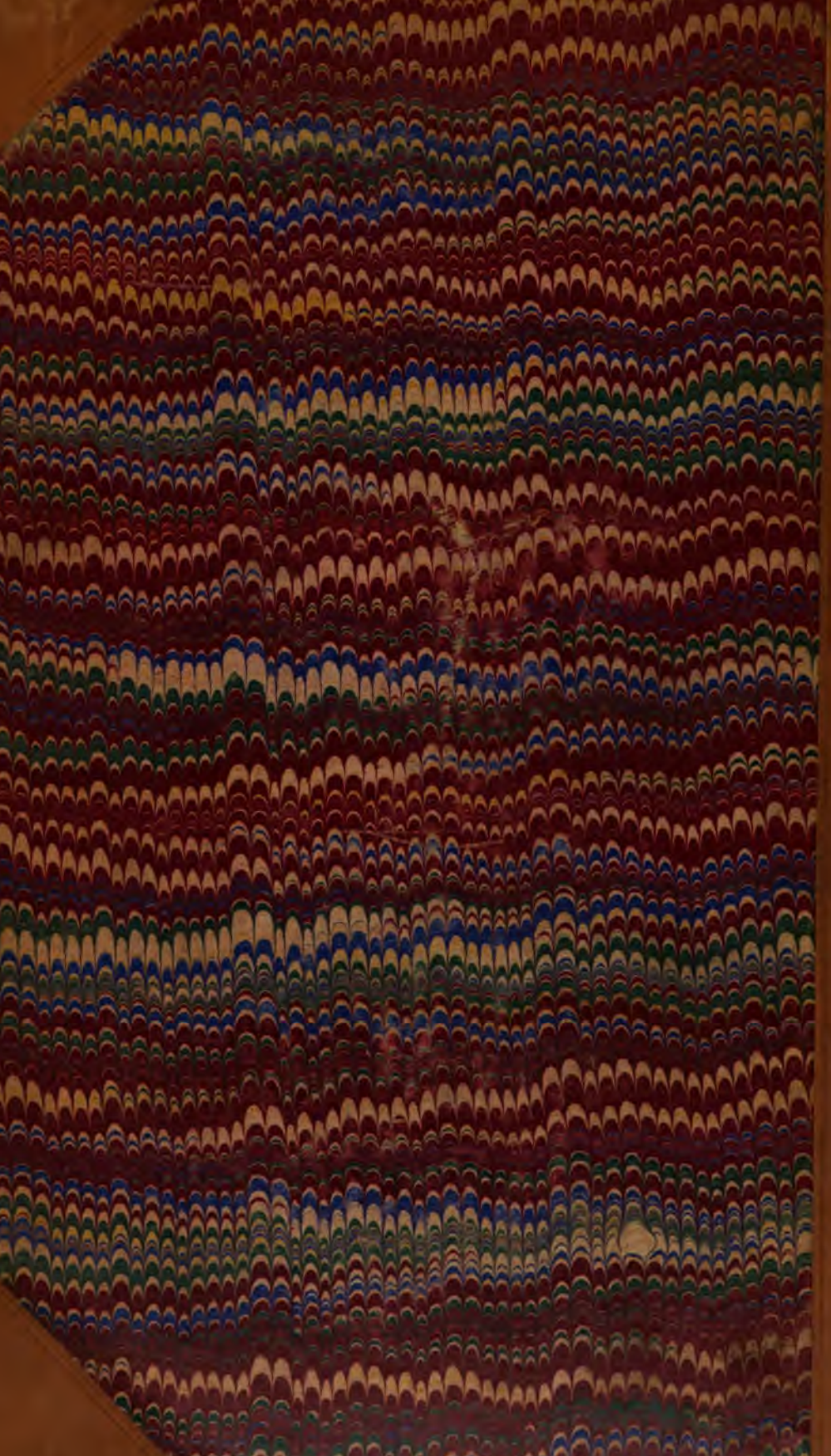
—— 3. *Notice.*] No notice is required before the action *en garantie*, the *mise en demeure* being made by the action itself. *Ib.* 203.

—— *See* ACTION QUI TAM, 393.

WIFE. *See* HUSBAND AND WIFE, 181.

WORDS.

"ENCLAVÉ," 295; "GROSSES REPARATIONS," 448; "INSTANCE," 291; POOL TABLE, 381; SERVANT, 260.

WRIT OF SUMMONS. *See* PROCEDURE, 190.

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